Supreme Court, U.S.
FILED
NOV 16 2006
OFFICE OF THE CLERK

No. 06-909

IN THE

SUPREME COURT OF THE UNITED STATES

PAMELA SMITH Petitioner

v.

DON COCHRAN Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Pamela Smith
12139 E. 38th Street
Tulsa, Oklahoma 74146
(918) 660-2838

PRO SE

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment with regard to procedural and substantive due process apply to Federal Judges who knowingly give erroneous rulings contrary to the Constitution and Civil Rules of Civil Procedure? If so, what standards govern the conduct of Federal Judges?

2. Whether inmate women in America's prison systems, who suffer rape, lose their constitutional protections because they are a ward of the state? And, if they do not lose those protections, what rights and protections do they specifically have and why won't the Federal Courts protect them instead of finding some legal way to protect police officers, prison guards, public officials and de facto prison guards.

3. Whether the process petitioner received in this case is sufficient to satisfy the substantive and procedural due process standard?

4. Whether a state employee given authority as a de facto prison guard who resigned his fourteen (14) year position, being accused of rape have a constitutional right to be defended with federal tax dollars through the State Attorney General's Office?

5. Whether the United States Supreme Court will continue to ignore the cries and pleas from raped and abused inmates in America?

6. Whether the United States Supreme Court will send a message to the Judiciary throughout America that it is not okay to rape helpless inmate women and hide their criminal activity under Sovereign Immunity and

qualified Immunity?

TABLE OF CONTENTS

OPINIONS BELOW iii

JURISDICTION iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED v

TABLE OF AUTHORITIES CITED vi

STATEMENT OF THE CASE viii

REASONS FOR GRANTING THE WRIT 1

CONCLUSION 20

INDEX TO APPENDICES

APPENDIX A — Order and Judgment of the 10th Circuit (June 28, 2006) A1

APPENDIX B — Opinion-Order of Northern District of Oklahoma (July 15, 2004) B1

APPENDIX C — Judgment of The 10th Circuit (September 8, 2003) C1

APPENDIX D — Opinion Order Northern District of Oklahoma (May 7, 2001) D1

APPENDIX E Offer of Proof E1

1. Affidavit of Don Roush
2. Story in Daily Oklahoman Newspaper
3. Trial Transcripts

APPENDIX F Instructions to The Jury F1

OPINIONS BELOW

Smith v. Cochran, 216 F.Supp.2d 1286 (N.D. Okl. 2001)

Smith v. Cochran, 339 F.3d 1205 (10th Cir. 2003)

JURISDICTIONAL STATEMENT

The order and judgment sought to be reviewed was made and entered on June 28, 2006. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 in that this action arose under 42 U.S.C. § 1983. The supplemental jurisdiction of the court was also invoked 28 U.S.C. § 1367. Petitioner's claim arose out of incidents to her state incarceration which incidents were in violation of the Eighth Amendment and Fourteenth Amendment of the U.S. Constitution, Cruel and Unusual Punishment and Due Process of Law.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) in that this appeal is after a final decision of the 10th Circuit Court of Appeal and the District Court.

The Judgment of the 10th Circuit Court was filed June 28, 2006. The Judgment of the District Court was filed March 1, 2004. Petitioner moved for a new trial on March 11, 2004. The Court denied the motion on July 15, 2004. The Notice of Appeal to the 10th Circuit Court was filed on August 9, 2004. The final judgment from the 10th Circuit Court is June 28, 2006. There were two separate orders filed on May 7, 2001 and an amended order filed on May 9, 2001. The judgment from those orders was filed September 8, 2003.

On August 23, 2006, Justice Breyer of this Court granted an Order extending the time for filing Petition for Writ of Certiorari up to and including November 25, 2006. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PAGE NUMBER

Fourteenth Amendment Due Process ..... iii., 3-4

Eighth Amendment Cruel and Unusual Punishment .. iii., 4

Sixth Amendment Right To Fair Trial 14

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

Dent v. West Virginia, 129 U.S. 114, 123 (1889) 4

DOE, 15 F.3d 452 n.4 2

Eddy v. Brown, 715 P.2d 774 (Okla. 1986) 2

Farmer v. Brennan, 511 U.S. at 828, id. 837 at 843 ... 9-10

Jones v. Union Automobile Indemnity Association, 28 F.2d 27, 29 (10th Cir. 1961) 15

Monroe v. Pape, (1961), 365 U.S. 167, 5L Ed 2d 492, 81 S.Ct. 473 3

Murphy v. Cincinnati Insurance Co., 772 F.2d 273, 277 (6th Cir. 1985) 10

Palmer v. City of Monticello, 31 F.3d 1499, 1506 (10th Cir. 1994) 10

Parratt Supra at 549 Rochin Supra 4

Scott v. Dixon, (1983) (CA 11 GA) 720 F.2d 1542 3

Smith v. Cochran, 339 F.3d 1205 (10th Cir. 2003) vii.-2

Sykes v. Cal Dept Motor Vehicle, (1974 CA 9Cal) 497 F.2d 197 3

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

Underwood Penn Ins Co., 888 F.2d 588, 590-591 (8th Cir. 1989) 10

U.S. v. Foppe, 993 F.2d 1444, 1451 (9th Cir. 1993) 10

U.S. v. Richardson, 161 F.3d 728 (9th Cir. 1998) 15

U.S. v. Smith, 629 F.2d 650, 653 (10th Cir. 1980) 10

STATUTES AND RULES

Federal Rules of Civil Procedure

28 U.S.U. § 1331

42 U.S.C. § 1983

28 U.S.C. § 1367

28 U.S.C. § 1254 (1)

Other

Lempert, et al., A Modern Approach to Evidence (West Pub. Co. 1977) pp. 148-153 11

2004 Trial Transcript id. 92 line 7 pp. 93 L 14 1-2

STATEMENT OF THE CASE

While Plaintiff/Petitioner Pamela Smith was incarcerated by the Oklahoma Department of Corrections, (herein referred to as DOC), she was sent on work duty to the Oklahoma Department of Public Safety (herein referred to as DPS), as a janitor. During her stay at this job, she was generally watched over by Defendant/Respondent Don Cochran. During that time, Defendant/Respondent used his authority to coerce her to engage in sexual behavior with him, culminating in an incident where Respondent used a salt shaker to commit rape by instrumentation.

Petitioner brought this action against Respondent under 42 U.S.C. § 1983, in that she was deprived of her federal rights by Respondent, a state employee. Particularly, Petitioner claimed a violation of her Eighth Amendment protections against cruel and unusual punishment. Respondent filed a motion for qualified immunity which was denied by the trial court, *Smith v. Cochran*, 216 F.Supp.2d 1286 (N.D. Okl. 2001). This denial was affirmed by the Tenth Circuit Court of Appeal, *Smith v. Cochran*, 339 F.3d 1205 (10th Cir. 2003).

After remand of the case, the matter was tried to a jury, which resulted in a verdict for Respondent. Judgment was entered thereon, March 2, 2004. Petitioner filed a timely motion for a new trial or, alternatively, for judgment notwithstanding the verdict. This motion was denied by Order of the trial court, July 15, 2004. A request for an extension of time to file a Writ of Certiorari was made to the Supreme Court of the United States and an extension was granted to and includes November 25, 2006.

REASONS FOR GRANTING THE WRIT

POINT 1: OKLAHOMA FEDERAL TRIAL A SHAM

In the Book of Exodus the 18th Chapter, Moses was directed by God through Jethro, Moses' father-in-law to chose "able men, such as fear God, men of truth, hating covetousness; and place such over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens.:" (22) "And let them judge the people at all seasons."

In this instant case, honesty and truth, and fundamental fairness eluded this court for obvious reasons. The courts in Oklahoma are not color blind. On the day of trial, as Judge Cook was introducing the attorneys to the jury, he thought Ms. Smith was one of the attorneys for the plaintiff. When he learned she was the plaintiff he was greatly surprised to know that she was black, because he thought the plaintiff was a white inmate. When one examines his earlier ruling of May 7, and May 9, 2001, Petitioner found several major changes in those rulings compared to those at trial. For example: May 7 and 9, 2001, he says, "An inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards."

In the trial transcript at *id.* 92, line 7; petitioner-plaintiff is testifying. She says, "My abuse kept going on. The rape kept taking place. He kept raping me, doing stuff to me." So– The court now stops the testimony and has the following dialogue with plaintiff's attorney. THE COURT: Excuse me. I need to see you. MS. BRIDGER-RILEY: "Yes your honor." THE COURT: "She is classifying what happened as rape. I think she ought to be testifying as to facts." MS. BRIDGER-RILEY: "Okay." "She always refers to it as that, but I'll tell her to try

not to." THE COURT: "You understand what I'm saying." MS. BRIDGER-RILEY: "Yes." THE COURT: "If you're testifying to classifications of conduct, you're not testifying to acts themselves. That's what we're trying to determine, whether the acts occurred and what they were."

Ms. Smith had testified the day before and on the day this dialogue took place that Cochran had forced her to have intercourse under the threat of being sent back to lock-up. She also, in prior testimony said Cochran gave her a condom and made her have oral sex with him. So, petitioner is at a lost to understand why it is not appropriate for her to use the word "rape," when this is a rape case and counsel for the defendant-respondent was allowed to use the word. She talked about how and when the rape happened. It should be noted that the word rape was never used in jury instructions.

Now, we turn to how helpful the court was to counsel for the defense. On (page 93, line 14, trial transcript), MS. BERGLAN: "I think you should instruct her not to use that phrase." THE COURT: "So it's okay to go on this way? I guess maybe because your position is nothing happened at all, so therefore the more she classifies these things, the more it plays into your position? That's fine, that's okay if you're in agreement with it." MS. BERGLAN: "We don't object." These kinds of comments from Judge Cook, favoring the defendant were constantly being made throughout the trial. In fact at times he helped counsel for the defendant try her case which is contrary to rules governing judicial conduct.

POINT 2: LACK OF DUE PROCESS

Look at what kind of due process Ms. Smith received. Judge Cook had denied Respondent-Defendant, his summary

judgment motion on qualified immunity finding that there was "sufficient factual matters alleged to support her claim that she was forcefully sexually battered and raped by instrumentation to sustain her burden at this stage." The court declined to adopt Cochran's argument that he had no supervisory duties over Smith during the time in question. Also, the court found that as a matter of law, Cochran's conduct rises to the level of extreme and outrageous conduct under *Eddy v. Brown*, 715 P.2d 774 (Okla. 1986). Judge Cook called Cochran's conduct "outrageous and utterly intolerable and went beyond the bounds of common decency." The 10th Circuit Court agreed with the lower court's ruling at *Smith v. Cochran*, 339 F.3d 1205 (10th Cir. 2003).

The question now becomes what changed from this prior ruling and Judge Cooks' more recent erroneous rulings at trial? No one knew exactly what issues should or should not be presented because there was no written pretrial order.

Smith did not have to prove Cochran acted under color of state law because the court in a prior ruling said, "The Court concludes that Cochran acted under color of state law in sexually abusing inmate Smith, finding that "a real nexus' exists between the activity out of which the violation occurred" Doe. 15 F.3d 452 n.4 and his duties and obligation as a DPS employee. But, in the jury instructions, at page 12, "State Official Acting under Color of State Law," Judge Cook said, "The act of a state official in pursuit of his personal aims that is not accomplished by virtue of his state authority is not action under color of state law merely because the individual happens to be a state employee." (Note the contradiction.) This obviously is an erroneous jury instruction to the jury on the issue of acting under color of law and one which misleads the jury and deprives petitioner substantial justice. "Misuse of

power, possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state law, is action taken "under color" of state law, within the meaning of 42 U.S.C. § 1983, which gives right of action against the person who, under color of state law, subjects another to deprivation of any rights, privileges, or immunities secured by Federal Constitution." *Monroe v. Pape*, (1961). 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (ovrld in part on other grounds by *Monell v. Department of Social Servs.* (1978). In order to show that private persons were acting "under color of state law" it is not necessary to allege that action taken was authorized by state; however, facts must be stated showing that defendants were clothed with authority of state and were purporting to act thereunder. *Sykes v. California (Dep't of Motor Vehicles)* (1974. CA 9 Cal), 497 F.2d 197. State action requirement under 42 U.S.C. § 1983 is satisfied by showing that deprivation resulted from exercise of some right or privilege created by state or by rule of conduct imposed by state or by person for whom state is responsible, and that party charged with deprivation is person who may fairly be said to be the state actor either because he is state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to state. *Scott v. Dixon*, (1983, CA 11 GA), 720 F.2d 1542. Cochran can not escape his role under color of law just because he was not a prison guard. To be charged for his conduct under color of law requires that he be a state employee an official of the state. The fact is he was classified as a de facto prison guard because there was a contract between DOC and DPS giving DPS employees authority and control over the prisoners working as trustees. Cochran was a driver's examiner for the State of Oklahoma and because he was an employee of the state, he was clothed with state authority to function in some capacity. The DOC, DPS contract gave him de facto guard authority, said contract was

admitted as an exhibit at trial.

Smith asserts that Cochran violated her right to liberty and due process of law under the Fourteenth Amendment. Moreover, she now asserts that the Federal Court in Oklahoma has violated her due process rights as demonstrated by several erroneous rulings and gross negligence by the Judge because of her race. After ruling favorably in her case, the Court now uses its discretionary powers to reverse itself at trial and systematically deny her the relief she is entitled to under law. Such denial by the court is consistent with other court rulings protecting police officers, prison guards, de facto prison guards, and public officials who have been accused of raping female inmates. (See trial transcripts). This woman was raped and raped with a GLASS SALT SHAKER (herein referred to as salt shaker). The investigator for DPS, Lt. Randolph, confiscated the salt shaker Cochran used to penetrate her vaginally and hid it in his desk drawer rather than submit it into evidence to be analyzed for semen and finger prints. This was the only physical piece of evidence in the case that would have verified her claim of rape by instrumentation and advance her claim of abuse. But the investigator for the state hid this evidence in an effort to cover up the crime and deny Smith her rights under the Fourteenth and Eighth Amendments.

Certainly, someone absent of partiality can see his reason for doing something like this; it was done by design to save the state any further embarrassment as well as save Cochran a felony criminal charge and possible prison time. What the investigator did with the evidence was completely against his training as a law enforcement officer investigating alleged crimes. He knew the proper procedure for the preservation of evidence of a crime. He also knew how important and essential that evidence was to prosecuting a criminal case. This is just

another example of the state using its resources to cover-up this crime of rape by a state employee. Quoting *Dent v. West Virginia*, "The touchstone of due process is protection of the individual against arbitrary action of government", 129 U.S. 114, 123 (1889). *Parratt*, supra, at 549 (Powell, J., concurring in result). "By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions." And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., *Rochin*, supra, it serves to prevent governmental power from being "used for purposes of oppression." The state put on a good show giving the impression Smith was receiving a fair trial which she did not. At best it was a gross miscarriage of justice and a shame this kind of behavior is tolerated in America's jurisprudence.

Once again there was no pretrial order from the Judge so the litigants would know what issues would be allowed or disallowed at trial. The court made up the procedures as the trial progressed and whatever would assist the defense that is what the court did. Everything about this case was done to discredit this woman in the eyes of the jury and save the state actors involved in this cover-up further embarrassment. Race was brought into the trial by counsel for the defense who works for the State Attorney General's Office. Here you have a black woman who was in prison suing a white man of rape; presenting a case before an all white jury whose minds obviously were made up before all the evidence could be presented. (See Trial Transcript, pp. 234-35).

It is a fact that it took the jury thirty-nine (39) minutes to reach a verdict. How they were able to sift through all the evidence and have discussions about that evidence in

such a short period of time is beyond reason, which speaks volumes about their conduct that there was no deliberation because they were pre-disposed to a verdict before the trial was concluded. There were forty-four (44) pages of jury instructions to read and understand; how those instructions applied to the evidence; and seven (7) days of testimony to consider; examine the exhibits and discuss the exhibits and their application to the evidence; then vote on a verdict. Thirty-nine (39) minutes is just not enough time and says there were no discussions between the jurors about the evidence. There was no applying the jury instructions to the evidence the jury heard within those seven (7) days of testimony because to do so takes time. And time is something the jury did not use to deliberate. One can only conclude that a reasonable jury would have taken the time to look at all the evidence presented to them for their consideration and a fair verdict given based on the weight of the evidence. There was the contract between DOC and DPS giving Cochran his authority and control over Smith while she worked as a trustee at DPS. This document needed to be reviewed and considered and that takes time. This all white jury did not do that. To be sure, this was a racist verdict not one given pursuant to the weight of the evidence.

This case is not about money, but justice. Petitioner has spent thousands of dollars of her own money to bring this man to justice, not only for herself, but other women similarly situated as her, but to no avail. Her cries for help has been ignored. Examine what justice this state provided for her:

1. The State Attorney General's Office is defending this man who resigned his job before this case was filed making him a private citizen illegally using taxpayer's money for his defense. He was not a state employee for the purposes of this

lawsuit. Why is the State of Oklahoma protecting Cochran? It is because the state has a special and competing interest to make this case go away.

2. Petitioner-Plaintiff not knowing who to trust or who to confide in kept quiet about her abuse for a time. Finally, she felt comfortable enough to talk to DPS employee Green who did not believe her. Then she complained to Cochran's supervisor about the sexual harassment and him giving her a condom for later use. Supervisor Spencer said he thought it was a joke and refused to write a complaint and forward it to his superiors. (See Trial Transcript, pp. 304-306). However, several weeks after the incident he asked Smith to write a complaint which she refused to do because she knew she would be sent to lockup and life would become a living hell in prison for complaining against a state employee.

3. Investigator Randolph confiscated the salt shaker Cochran used to penetrate her vaginally and hid it in his desk drawer.

4. She turned to the Tulsa County District Attorney's Office for help, but was denied.

5. She gathered thousands of signatures to call a grand jury to look into Cochran's sexual abuse and rape, but was again denied any assistance because the grand jury refused to call her witnesses; they called the State's witnesses.

6. She tried the Governor's Office but was turned away.

7. She wrote letters to the U.S. Attorney General, still denied any help.

8. She tried the courts and once again she is denied due process and raped by the Oklahoma "good ol boy" Court system.

9. Then her attorneys begin to work in concert with the defense attorneys and the judge to deny her any rights, giving the appearance of fairness knowing this was a cover up of state employee's indiscretion, i.e., (sexual misconduct), which by the way, have been ongoing since 1979. It should be noted that her attorneys quit the case and would not file an appeal, money not being a concern. She then had to find another attorney to press the appeal to the 10th Circuit Court at great expense, once again denied relief. Her attorneys refused to subpoena Lt. Randolph the DPS investigator who confiscated the salt shaker and the surplus clerk who sold Cochran condoms for what Cochran said to him, was for the expressed purpose "to have sex with the inmates." The clerk's name is Terry Lackey, who would have testified that he sold the condoms to Cochran in November 1997. Attorney Bridger-Riley released the other defendants from the lawsuit without the benefit of Smith's knowledge or consent. The State and Bridger-Riley were working together to give the impression Smith

was receiving justice, but it was a sham.

10. After the 10th Circuit Court denied her appeal, this attorney quit the case and refused to prepare a Writ of Certiorari to the United States Supreme Court. So, now she has to find an attorney who is not influenced or afraid of the State to take her case. Attorney Michael Gassaway was hired, only to find out he could not practice in Federal Court because of serving a prison sentence. Unable to find an attorney to take this case, she had to file this Writ, Pro Se.

11. DPS refused to discipline Cochran after he failed a polygraph examination about the Rowe complaint, (the fifteen (15) year old driver's license applicant), which allowed him the opportunity to rape Ms. Smith two weeks later. Since his resignation and his employment with the City of Chelsea, it is reported he molested a thirteen (13) year old girl and now her father is trying to find him to kill him.

If the court had allowed the plaintiff to prove her case, she would have demonstrated that some DPS employees have a pattern and practice of rape and attempted rape of inmate women and their ability to cover up the crimes. But she was not allowed to do that because of what the court said would be highly prejudicial. The facts would have been such that a case of rape, violation of the Fourteenth Amendment, the Eighth Amendment would be proven beyond any doubt if she had a fair trial.

12. DPS required Cochran to take a polygraph instead he resigned the next day because his attorney advised him not to take the polygraph. Then in court he testified he resigned for medical reasons.

13. The Attorney General's staff threatened a state employee witness with the loss of her job if she did not talk with them, which caused an emergency protective order to be filed on the 31st day of December, 2003, strongly suggesting cover-up.

14. Denying Petitioner-Plaintiff discoverable documents then the court allowing testimony from those same documents without Petitioner-Plaintiff being allowed to study the material before it was presented to the court within the hearing of the jury.

15. Denying Petitioner-Plaintiff the opportunity to provide rebuttal evidence as to Cochran's good character, reference his Christianity, when Jesus said in Matthew, "if you divorce a woman and marry another you commit adultery." This man has not only remarried several times, but was caught in an affair with a woman while still married which went directly to his character and credibility which was rebuttal evidence as to his alleged good character.

All of these incidents taken collectively show an effort to deprive Smith of her constitutional rights under procedural-substantive due process clause, "which bars certain arbitrary

government actions regardless of the fairness of the procedures used to implement them." And, it further shows the state had special interest in directing the outcome of this case to be sure petitioner did not prevail.

Consider the guarantee of fair procedure, sometimes referred to as "procedural due process": the state may not execute, imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards. Certainly, one cannot find fundamental fairness in this trial. (See Trial Transcript, pp. 639-49). When you consider the many erroneous rulings by Judge Cook, and the way he fashioned the procedures for the trial; (See Trial Transcript, pp. 182-91); the irregularities in the investigation, (hiding the salt shaker); and when one looks at the facts objectively, there can be no doubt that this case and this trial was fixed and unfair in its inception and throughout the course of the trial.

POINT 3: DELIBERATE INDIFFERENCE CLAIM

On the 19th day of September, 1997, a fifteen (15) year old female from Central High School named Candance Rowe was tested at the school for driving privileges. She was told by Don Cochran that she failed the test and to come tomorrow to DPS in Tulsa to be retested. The next day her grandmother took her to DPS to be retested. She took the written test and was told by Cochran that she had once again failed the test. He continued, "What will you be willing to do to get your permit?" Ms. Rowe said, "anything" not knowing exactly his intentions. She thought he wanted money because it is not unheard of that driver's examiners take money for license. He told her to accompany him to a room in the back of the building, which she did. Once in the room, he closed and

locked the door, told her she was a pretty girl and would she have sex with him to get her permit. At that time she reminded him she was fifteen (15) years old and NO. She unlocked the door and started out of the room only to be called back and given her permit. It was later learned that she had passed the test twice, once at the school and at DPS. His excuse for taking her to the back room was to discipline her for being disrespectful. The grandmother was standing there not ten feet from Cochran and her granddaughter. Why wasn't she called to discipline her? No, Cochran's intended purpose was to rape this girl; to have sex with her.

Cochran was called to Oklahoma City and interviewed about this incident; given a polygraph which he failed, and was told to go back to work with a reprimand. Now because DPS deliberately failed to charge this man with a crime, terminate him pursuant to state rules governing moral turpitude, two weeks later he raped inmate Pamela Smith. Since resigning from DPS he has been hired in Chelsea where he was accused of molesting a thirteen (13) year old girl.

In *Farmer v. Brennan,* 511 U.S. at 828, the Supreme Court held that "a prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment". Certainly, DPS officials knew Cochran was capable of harming women, because this was not the first complaint against him. Officials at DPS ignored this man's misconduct which ultimately caused Ms. Smith to be raped. It should be noted when she complained, he was ordered to take a polygraph; he refused by resigning. Regardless of his reason for resigning, he would not take the polygraph to prove his innocence only because he knew he was guilty.

The Supreme Court further explained that such deliberate indifference exists if "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference". *Id.* at 837.

The Supreme Court also made clear in *Farmer v. Brennan, Id.* at 843, that, in order to have a viable deliberate indifference claim, a plaintiff is not required to allege and prove that the defendant or defendants specifically knew about or anticipated the precise source of the harm. Nor may defendants escape liability for deliberate indifference by showing that while they were aware of prior incidents with (Cochran and other DPS employees, who raped inmates or tried to rape inmate women, they did not know that the plaintiff in this case was especially likely to be assaulted by Cochran who eventually committed the assault.) (Emphasis mine).

Officials at DPS knew that Cochran was likely to harm women because of the most recent complaint by Ms. Rowe indicated that he was capable of such conscience shocking conduct. He tried to rape a fifteen (15) year old seeking to get a driver's permit, then lied about it and used some flimsy excuse for taking her to the back room he was trying to discipline her away from others. Evidence of his bad character and like of veracity was failing the polygraph. Evidence was elicited that Respondent-Defendant was required by DPS to take a polygraph test. He quit his job just prior to the time that, the test would be required. The court allowed this intrinsic evidence in because it was relevant to Respondent's state of mind. However, by the time of closing argument, Petitioner was foreclosed from arguing this highly relevant credibility issue. Petitioner was prevented from arguing one of the key

components of her case to the jury. *U.S. v. Smith*, 629 F.2d 650, 653 (10th Cir. 1980) (the unfair prevention of a party from presenting a particular part of its closing argument constitutes reversible error); *U.S. v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (a party suffers prejudice if it was unfairly prevented from arguing its case to the jury). The 10th Circuit Court held in *Palmer v. City of Monticello*, 31 F.3d 1499, 1506 (10th Cir. 1994), that the refusal to take a polygraph test carries an independent significance. See also *Underwood v. Colonial Penn Insurance Co.*, 888 F.2d 588, 590-591 (8th Cir 1989), (refusal to take polygraph test admissible); *Murphy v. Cincinnati Insurance Co.*, 772 F.2d 274, 277 (6th Cir. 1985), holding that the willingness to submit to a polygraph test is admissible, even though the results of the test might not be). Because the credibility of Petitioner and Respondent were so central to the case, the preventing of Petitioner from arguing one of the central items showing that Respondent was not being forthcoming denied her substantial justice. The Federal Rules of Evidence severely limit character evidence. (F.R.E. 401). This is because such evidence has a great probability to change the regret matrix. Lempert, et al., *A Modern Approach to Evidence*, (West Publishing Company, 1977), pp. 148-153.

> Where two sides present evidence that contradict each other, the fact that one side is perceived as a bad person and the other side as a good person, apart from the evidence itself, changes the "regret matrix." In other words, a jury is more likely to find against the person that it perceives as otherwise bad because it has less regret if it makes a wrong decision because the person was unworthy anyway. Allowing evidence as to who is "good" and who is "bad," other than on truthfulness issues related to witnesses, thus

changes the focus of the trial from the legal issues to issues based on prejudice.

This Respondent-Defendant was accused of raping Ms. Smith with a salt shaker. The DPS investigator hid the salt shaker in his desk drawer so the evidence would not be analyzed and used at trial. Cochran was required to take a polygraph examination which he refused, which speaks volumes about his propensity for lying. He was less than truthful about this incident with Ms. Rowe and he lied about not raping the plaintiff. Cochran's conduct should have been indicators to DPS officials that he was capable of harming women. They did nothing to correct this obvious serious problem with Cochran and women and because they looked the other way, Ms. Smith was injured which makes DPS culpable. The fact that the salt shaker the real piece of evidence in the case was hid goes directly to a deliberate indifference claim against DPS and increased the likelihood of DPS culpability.

POINT 4: COCHRAN'S SUPERVISOR

ED SPENCER TESTIMONY: He testified that he had interviewed Ms. Rowe's grandmother and mother which resulted in perjured testimony. He never talked to Ms. Rowe or her parents, but he testified in court as to what they told him in an interview which never happened. A letter was written to Judge Cook about the perjured testimony but to no avail. However, on the other hand, Ms. Cochran completed her testimony where she testified correctly. She finished testifying, went into the audience where someone told her she needed to change her testimony about certain dates surrounding events because one of the other witnesses had testified differently. She was put back on the stand against objections and allowed to change her prior testimony after being guided by a conversation

with someone in the audience. (See Trial Transcript, pp. 520-525). This state employee was obligated to report Cochran's behavior to his supervisors but refused because he thought, "if it happened, it may have been a joke between Mr. Cochran and Pam." How absurd; Mr. Spencer received training in sexual harassment and knew full well what his responsibility was, but did not correctly respond to his responsibility because Cochran is a friend and he did not want to cause him trouble. Ms. Smith suffered harm because of his inaction and negligence.

After the first violation of DOC rules, Ms Smith did not go to Mr. Cochran and say to him, let's have sex so you won't report the violation to DOC. On the contrary, Mr. Cochran approached Ms. Smith and said you have to do something to convince me you can be trusted. She felt powerless to have any control over her life as soon as she was put behind prison bars. Cochran threatened to expose her misconduct if she did not cooperate with him, (a tactic used by several DPS employees when they wanted to take advantage of the inmates); (see Offer of Proof, Appendix E), so when she was allowed to have some freedom from behind the prison walls, to have another opportunity to see the sun, breath fresh air outside the walls, be close to her family, she did not want that privilege jeopardized. She never traded sex for favors, she did not ask Mr. Cochran to have sex so she could have special privileges, but out of fear she just followed orders. It should be noted Cochran not only violated his responsibility to the DOC and DPS contract, but he actively and willingly participated in assisting Smith's violation of DOC rules.

POINT 5: ERRONEOUS JURY INSTRUCTIONS

The court's error in jury instruction at page 10, said plaintiff must prove that "the defendant was a person acting

under color of state law." The court found that "Cochran acted under color of state law in sexually abusing inmate Smith, finding that a real nexus exists between the activity out of which the violation occurred and his duties and obligations as a DPS employee. Based on the foregoing facts, Cochran, as a DPS employee, was acting under color of state law when interacting with Smith." (Order, May 7, 2001, U.S. District Court).

Requirement of Custodial Capacity: The instruction on page 18, that plaintiff must prove that the defendant had custodial authority of administering the conditions of plaintiff's custody while she worked at DPS is verified by testimony that he and Ed Spencer were the only DPS employees to attend a DOC class on handling prisoners working at DPS. This issue was not something which needed to be proved by the Petitioner-Plaintiff because it was never mentioned in a pretrial order. In fact, most of the jury instructions were not a part of a written pretrial order so the litigants could know what issues to prove or disprove. The only question before the court was did Cochran have sex with Smith?

Sexual Assault and Battery: "The defendant acted without consent to intentionally touch, maul or feel the body or private parts of plaintiff;" Sexual battery is a state charge and although the criminal system refused the charge, the court was very careful in not allowing this kind of evidence into the record, so the instruction to the jury is a moot point and intended only to confuse the jury. (p. 20).

Impeachment: Page 27, the error is "has failed to say or do something which is inconsistent with the present testimony of the witness." The definition in Blacks Law Dictionary on "impeachment of witness" says, "Adducing proof that a witness

who has testified in a cause is unworthy of credit."

This definition has nothing to do with something a person failed to do, just what a person has testified to. The jury instruction is error.

Arguments and Statements of Counsel Are Not Evidence: Page 40 of the jury instruction is ambiguous when it says, "The evidence consists of the sworn testimony of the witnesses, exhibits, facts stipulated, and all pertinent presumptions stated in these instructions." "You are to consider only the evidence in the case." "However, in your consideration of the evidence, you are not limited to only the statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified in the LIGHT OF YOUR EXPERIENCE." The jury instruction is not clear and it is error because only consideration of the evidence is allowed by the jurors and they are to give it the weight they deem necessary as it applies to the law not something based on their life experiences. Witness statements, the exhibits accepted into evidence, the facts stipulated to, not how someone would apply their life experiences to the testimony. The judges "pertinent presumptions" in jury instructions is not evidence as he tries to make it appear but those instructions are supposedly the law the jury is to follow in rendering its verdict not the judge's personal slant on the evidence presented at trial. Some of the instructions are not consistent with law and are the judge's personal interruption of the law and not the meaning Congress intended to be applied to such law. Examine just briefly the phrase, "in light of your experience." This was an all white jury, so none of them could possibly know how it feels or what it feels like to have a black experience in Oklahoma. They have never been black and discriminated against and to

suggest they could possibly know what a black person has to endure in America and in this justice system, which is systematic to racism is ludicrous. So, the question, how could they possibly know how to be impartial and objective drawing from their "LIFE EXPERIENCES" and applying those experiences to Ms. Smith's life and this case? The jury instruction is flawed at best and error attaches which should be grounds for a new trial in a different venue with a different judge.

CONCLUSION

The safeguards put in place to protect victims of rape by public officials, prison guards, police officers, and de facto guards have been systematically eroded by our judiciary throughout America. Every case I have studied suggests that officials who rape are protected by the courts. Our laws do not protect the victims of crimes when they are committed by public officials. Judges and lawyers find some loop hole to help them in some way and protect their criminal activity. Truth has left our judicial system. The laws designed to punish those who violate the constitutional rights of inmate women are the same laws judges use to protect officials who are caught in such illegal practices, simply stated, it promotes their immoral and criminal activity because they know they will not suffer any repercussion from the judicial system; which brings us pass the time for the United States Supreme Court to change the course of interpreting law from favoring officials to giving relief to victims of crimes perpetrated by those officials charged with the responsibility of protecting helpless inmate women. This petitioner, Pamela Smith, was raped by the respondent and the rape ignored by his superiors, and now she finds herself being raped by the court system which is supposed to protect her. Judges in America interpret law to favor officials in their

criminal behavior rather than seek truth and justice for the rape victims.

Consider the composition of the jury. Then look at the way the jury pool is chosen in this state. The racial makeup of jury pools, seldom include people of color and most certainly few, if any, are allowed to sit on Federal Jury. This system fails miserably to adequately account for minorities in the selection of jury pools. There is an imbalance in those selections and such imbalances violates the Constitution's Sixth Amendment right to a fair trial and consequently denied Smith a fair and impartial trial. Even an all white reasonable jury, free from racial ideology and hatred for people of color, would have voted for the Petitioner-Plaintiff given the evidence presented at trial although such evidence was limited on her behalf. The only inference which could have been drawn from the evidence is one of vindication and relief for the petitioner.

Oklahoma's Administrative Office of the Courts has failed to conduct timely reviews of the master jury list. So, how can a person of color receive a fair trial in this state when historically the deck has been and still remains stacked against him/her before a trial begins?

When counsel for the defense in cross examination of Ms. Smith, made another reference to race in the record, the Trial Transcript at pp. 234-35, where she suggest that Smith hated to work in Jenks because it is predominately white people living in the area was unnecessary and not remotely related to whether Cochran raped Smith or not and it should never have been allowed into evidence. Once again, defense counsel used another strong effort to interject race into the trial and appeal to an all white jury for the verdict in their favor and I must admit it worked.

What does working in a predominately white area of town have to do with whether a rape occurred or not? This is the kind of testimony Judge Cook allowed into the record throughout the trial because there was no written pretrial order explaining what could or could not be introduced into evidence.

Federal Rule of Civil Procedure 16 requires a pretrial order prior to trial. Although Petitioner-Plaintiff attempted to have a Pretrial Order signed and entered, it was not. Counsel for the defense capitalized on this, proffering evidence and exhibits which would otherwise be inadmissible due to counsel for the defense failure to produce and or list the same on the proposed pretrial order. The proper entry of a pretrial order would have resulted in the greater definition of the factual and evidentiary issues and, undoubtedly, have obviated some of the harpoons that were thrown into the trial as otherwise pointed out herein. (See, e.g., *Jones v. Union Automobile Indemnity Association*, 287 F.2d 27, 29, (10th Cir. 1961).

The race problem was exacerbated by defense counsel's comments in closing, "look at the defendant and then look at plaintiff." In *U.S. v. Richardson,* 161 F.3d 728 (9th Cir. 1998), the court held that the claim that "we all don't look alike" invited racial stereotyping. What she is suggesting is what you see is a black woman suing a white man. No other inference could possibly be drawn from those kinds of inflammatory remarks and those kinds of remarks have nothing whatsoever to do with sexual misconduct–rape.

During the integration period in Oklahoma, our white brothers have reluctantly said, you can sit at our tables to eat, attend school with our children, and if you are lucky enough you may work in a government job. But you will never sit at our table of "JUSTICE." Why? Because this is the only way

left to keep you "OPPRESSED."

Petitioner met a former Oklahoma Highway Patrol Trooper at an NAACP meeting. She told him her story about being raped by a DPS employee, and was told that her case was not unique, that other inmates have had the same experiences with DPS employees and DPS cover-up of those incidents. He told me about a Lieutenant who claimed he investigated an allegation of sexual misconduct by DPS personnel in 1979, and the allegation was unfounded. Approximately four years later some of the inmates got up enough courage to complain to the ACLU for help. The same Lieutenant who investigated in 1979 was the one who was sexually harassing the inmates. (See Offer of Proof, Appendix E, attached). Our country is spiraling downward toward moral decay, please help stop this erosion of moral decay in America.

For these legitimate reasons, and the fact that Oklahoma Courts have departed from the "accepted and usual course of judicial proceedings" Petitioner, Pamela Smith, respectfully request this Honorable Court give her the relief she deserves, and grant her Writ of Certiorari and any other relief the Court deems appropriate and necessary. Pursuant to Supreme Court Rule 10, please exercise the Court's supervisory power over the Courts in Oklahoma. We need justice here for all, especially for people of color.

Respectfully submitted,

PAMELA SMITH, PRO SE
12139 E. 38th Street
Tulsa, Oklahoma 74146
(918) 660-2838

Appendix A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeal
Tenth Circuit

June 28, 2006

Elisabeth A. Shumaker
Clerk of Court

FILED

JUL 24 2006

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAMELA SMITH, an individual

Plaintiff - Appellant,

v.

DON COCHRAN, an individual,

Defendant - Appellee.

No. 04-5114
(D.C. No. 00-CV-035-C(J)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **LUCERO, ANDERSON,** and **TYMKOVICH,** Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.6.

Pamela Smith, an Oklahoma state prisoner, filed suit against Don Cochran, an employee of the Oklahoma Department of Public Safety ("ODPS'), alleging that Cochran repeatedly raped her while she was employed at an ODPS facility as part of a work-release program. On submission of the case, a verdict was returned by the jury in favor of Cochran. Smith appeals, claiming that numerous evidentiary and procedural rulings of the district court were erroneous and affected the outcome of her trial. Because we conclude that none of the challenged rulings rise to the level of legal error or affected the outcome of the trial, we exercise jurisdiction under 28 U.S.C. § 1291 and **AFFIRM.**

I

In September 1997, Smith was relocated to a lower security correctional facility, the Tulsa Community Correctional Center (the "Tulsa Correctional Center"), a facility that has since been closed by the Oklahoma Department of Corrections ("ODOC"). Inmates of the Tulsa Correctional Center were required to participate in a work-release program. Under this program, they performed jobs within the Tulsa community during the day and returned to the Tulsa Correctional Center each night. At all other times they were confined within the Tulsa Correctional Center.

From approximately November 1997 until May 1998, Smith was assigned to work as a janitor at two driver's license examination centers operated by ODPS; one located in northern Tulsa, Oklahoma (known as the "North Tulsa" facility) and one located in Jenks, Oklahoma (known as the "Jenks" facility). Many of Smith's family and friends lived near the North Tulsa facility, and she preferred to work primarily at that location. It was while working at the North Tulsa facility that Smith met

defendant Don Cochran, a driver's license examiner employed by ODPS.

Smith and Cochran have divergent recollections of events following their meeting and introduction. Smith's recollection is as follows: Cochran approached her on her first day of work at the North Tulsa facility and commented on the size of her breasts. Later that week, Cochran took advantage of a work-release program rule violation he observed Smith committing by essentially black-mailing her into revealing her "body parts." Following this incident, a pattern developed whereby Cochran turned a blind eye to her rule violations – which were numerous, including family visits, personal telephone use, and leaving the North Tulsa facility to go to a local store – in return for an increasing level of sexual activity with Smith, first oral sex and then sexual intercourse. During their final sexual encounter, Cochran used a salt-shaker to penetrate her. Smith then discontinued sexual relations with Cochran. Her sole attempt to inform others of Cochran's sexual demands was laughingly dismissed by other ODPS employees, although she and other ODPS employees observed Cochran engage in sexual relations with other women in the very storage room where her sexual encounters with Cochran occurred. Cochran denies all of Smith's claims.

In August 1998, the Tulsa Correctional Center was shut down and Smith was transferred to the Eddie Warrior Correctional Facility (the "EW Correctional Facility"), where she immediately disclosed Cochran's sexually abusive behavior to ODOC personnel. ODOC promptly provided Smith with medical and psychological treatment, and also initiated a formal investigation into Cochran's activities at the North Tulsa facility. Cochran was notified that as part of the investigation he must submit to a polygraph examination. As the date of the

polygraph exam approached, Cochran resigned from ODPS because of a "serious medical condition," expressly denying that his actions were related to Smith's claims or the investigation.[2] He never completed a polygraph exam, and no further action was required of him after his resignation was accepted. In December 1998, ODOC closed the investigation into Smith's allegations.

Smith filed suit against Cochran in federal district court under 42 U.S.C. § 1983, claiming violations of her Fourth, Fifth, Eighth, and Fourteenth Amendment rights. She also asserted state tort law claims for sexual assault and battery and intentional infliction of emotional distress. Cochran moved for summary judgment on the grounds that he was entitled to qualified immunity. The district court denied this motion, and we affirmed. Smith v. Cochran, 339 F.3d 1205 (10th Cir. 2003).

At trial, the only issue before the jury was whether Cochran and Smith had engaged in sexual relations.[3] Smith testified that Cochran repeatedly raped her. Cochran's defense was that Smith was a con artist trying to shake him down for money, and he identified numerous inconsistences between Smith's direct testimony, her responses during cross

---

[2]At trial, Cochran admitted that he refused to take a polygraph examination on the advice of his counsel.

[3]In a prior opinion, we held that because Smith was a state prisoner in the custody of ODPS employees while she was working at the ODPS facilities any sexual activity between her and any ODPS employee is deemed non-consensual as a matter of law. See Smith, 339 F.3d at 1214. Thus, Cochran was liable if he had engaged in any sexual activity with Smith, regardless of whether she actually consented to performing sexual acts with him.

examination, and her deposition answers. After a six day trial, the jury deliberated for approximately one hour before reaching a verdict in favor of Cochran. Smith then filed a motion for a new trial under Federal Rule of Civil Procedure 59(a), or in the alternative, a motion for judgment notwithstanding the verdict, which was denied. Smith appeals, challenging eight district court evidentiary and procedural rulings in Cochran's favor, and the denial of her motion for a new trial.

II

Smith appeals the district court's evidentiary rulings admitting into evidence (1) her prior statement that "you can take some checks from the bottom of [elderly peoples'] checkbook[s] and they won't know it's missing for a while," (2) Cochran's testimony that he was a good Christian and references by other witnesses to Cochran's Christianity, (3) transcripts and reports prepared as part of ODPS's internal investigation used to impeach Smith's witnesses that Cochran did not provide to her prior to trial, and (4) statements by other witnesses as to her sexual promiscuity while working at ODPS' North Tulsa facility. Smith also objects to the district court's (5) failure to disturb an implied racial statement made by Cochran's counsel during closing argument, and (6) ruling prohibiting Smith from arguing during closing argument that Cochran was not credible because he quit his job to avoid taking a polygraph examination.

We review a district court's evidentiary decisions for abuse of discretion, and "will not disturb the determination absent a distinct showing the decision was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir. 1995). Even if a litigant proves that

the district court abused its discretion in admitting or prohibiting certain evidence, the litigant must also prove that such error affected the litigant's substantial rights. Fed. R. Civ. P. 61. An error affects a party's substantial rights if it altered the outcome of the proceedings or produced a contrary result. Grace United Methodist Church v. City of Cheyenne, 427 F.3d 775, 802-803 (10th Cir. 2005).

A

Smith claims that the district court erred by improperly admitting as character evidence under Federal Rule of Evidence 404(b) Smith's statement to an ODPS employee that "you can take some checks from the bottom of their [elderly people's] checkbook and they won't know it's missing for a while." Federal Rule of Evidence 404(a) states that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving an action in conformity therewith on a particular occasion . . . ." An exception to this general rule is found in Rule 404(b), which provides that evidence of a litigant's prior "crimes, wrongs or acts" may be admissible to show the litigant's "motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Because Smith raises this Rule 404(b) arguments for the first time on appeal we review admission of this evidence for

plain error.[4] Fed. R. Evid. 103(a)(1) (providing that "nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court); Goebel v. Denver & Rio Grande W.R.R. Co., 215 F.3d 1083, 1088 n.2 (10th Cir. 2000). "To constitute plain error, the district court's mistake must have been both obvious and substantial." Cartier v. Jackson, 59 F.3d 1046, 1050 (10th Cir. 1995). In civil cases, the plain error exception is limited to errors that "seriously affect the fairness, integrity, or public reputation of judicial proceedings." McEwan v. City of Norman, Okla., 926 F.2d 1539, 1545 (10th Cir. 1991). Cochran's theory of the case was that Smith was a con artist attempting to steal money from the defendants. Admission of this evidence for that limited purpose – to show Smith believed she had the present ability to con people – was clearly a proper application of Rule 404(b).

B

We next consider whether the district court committed error by allowing Cochran to introduce evidence that he was a "good Christian" in claiming violation of Federal Rule of Evidence 610 and improperly prohibiting Smith from introducing rebuttal evidence disputing Cochran's alleged

---

[4]Below, Smith challenged this evidence on the grounds that its admission was precluded by the district court's in limine order excluding evidence of "Plaintiff's past arrest record for those crimes that are beyond the 10 year limitation of Federal Rule of Evidence 609(b)." Federal Rule of Evidence 609(b) prohibits admission of evidence concerning a witness's prior conviction for a crime "if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed, whichever is later." This argument was rejected by the district court, and Smith does not raise it on appeal.

Christianity and good character.

Federal Rule of Evidence 610 provides that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." Two pieces of evidence, Smith contends, should clearly have been inadmissible under this rule: Cochran's testimony that he visited Smith's sister in the hospital because he "got closer to God" following the death of his wife's stepfather, and testimony by other witnesses that they became acquainted with Cochran at various religious events. Because Smith did not object to introduction of this evidence below, we review admission of this evidence for plain error. See McEwan, 926 F.2d at 1545.

Smith insists that introduction of this evidence was prejudicial, but no explanation has been offered by Smith as to how this evidence either enhanced Cochran's credibility or affected the fairness, integrity, or public reputation of the proceedings. Because of that failure, admission of the evidence was not plain error.

Had she been permitted to rebut evidence of Cochran's Christianity and good character by questioning him about his prior marriages and introducing evidence that his wife was currently married when they met, Smith explains, the claimed prejudice would have been neutralized. Authority for conducting these inquiries exists, Smith submits, under Federal Rule of Evidence 608(b), which provides that "[s]pecific instances of conduct of a witness for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the

discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . ." When Smith attempted to cross-examine Cochran on these topics, the district court found that neither Cochran's prior marriages nor the marital status of his wife when he and his wife met was relevant to whether he was a good person or his veracity. Additionally, evidence that he had been married before had no relevance to his current status as a Christian, the court determined, because Cochran converted to Christianity after marrying his current wife. Given the tenuous connection between a person's prior marriages and their tendency to be truthful on the witness stand, the district court's decision to exclude this evidence is not an abuse of its discretion.

C

Our review now turns to Smith's claim that she was unfairly prejudiced when the district court admitted various transcripts of interviews and reports prepared as part of ODPS's internal investigation for the purpose of impeaching Smith's witnesses.

First, Smith contends that Cochran's failure to produce these documents during discovery, as she requested, prohibits Cochran from utilizing them during the trial for impeachment purposes. No evidence has been presented by Smith that she actually requested the evidence at issue. Accordingly, we address whether Cochran was requested to produce these documents under the Federal Rules of Civil Procedure 26(a)(1)(B) in order to use them for impeachment purposes during trial. Rule 26(a)(1)(B) requires that a litigant produce "a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in

the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment." In this case, the district court correctly found that Cochran used the transcripts solely for impeachment purposes, and thus was not required to produce these documents under the plain language of Rule 26(a)(1)(B).

In this same context, Smith posits that she is entitled to relief from the jury verdict in Cochran's favor under Federal Rule of Civil Procedure 60(b)(3) because Cochran's knowingly concealed the ODPS documents during the proceedings. Rule 60(b)(3) provides that a district court may relieve a party from a final judgment based on the "fraud . . . misrepresentation, or other misconduct of an adverse party." "A party moving for relief pursuant to Rule 60(b)(3) must establish the alleged misconduct by clear and convincing evidence .... This can only [be accomplished] by showing that the [opposing party] acted with an intent to deceive or defraud the court, by means of a deliberately planned and carefully executed scheme." Yapp v. Excell Corp., 186 F.3d 1222, 1231 (10th Cir. 1999) (internal quotations and citations omitted). Because the only evidence that Cochran concealed these transcripts are Smith's conclusory allegations to that effect, Smith has failed to prove by clear and convincing evidence that Cochran intended to deceive or defraud the court by knowingly concealing these documents.

D

Yet another prejudicial error occurred, Smith asserts, when the district court permitted Cochran to present evidence regarding his demeanor while working at DPS. Effectively conceding that she failed to timely object to admission of this evidence at trial – Smith notes in her brief that she first raised

this objection in her motion for a new trial – we review for plain error. Dodoo v. Seagate Technology, Inc., 235 F.3d 522, 529 (10th Cir. 2000) (internal citation omitted). In this case, Smith brought a state law claim for intentional infliction of emotional distress, sought damages in her § 1983 claim for "severe emotional distress," and testified that she was generally shy around men. Cochran introduced evidence that after the alleged rapes occurred Smith rubbed her breasts against a co-worker and danced while singing a song. This evidence, the district court concluded, was relevant to whether Smith suffered severe emotional distress and rebutted Smith's trial testimony regarding her attitude toward men. We take the district court's position and conclude that it was not plain error to admit this evidence.

E

The series of errors continued, Smith claims, when trial court failed to disturb an implicit racial statement made by Cochran's Caucasian counsel during closing to the all-white jury about Smith, who is African American.

To the extent that Smith is contesting that existence of an all-white jury violated her rights, Smith has failed to allege a cognizable claim under the Fourteenth Amendment. Brown v. Crouse, 425 F.2d 305, 309 (10th Cir. 1970) (holding that the district court did not err in allowing an African-American plaintiff's claim to be tried to an all-white jury, even where African-American jurors had been removed pursuant to peremptory challenges). And Smith has not asserted a claim under Batson v. Kentucky, 476 U.S. 79 (1986), that her rights were violated because counsel for Cochran challenged African-American jurors based on their race. Thus, we conclude that her general objections to a jury comprised entirely of

Caucasians is meritless.

This brings us to Smith's claim that Cochran's counsel made an implicit racial statement during closing that invited the jury to enter "a racist verdict." At trial, Cochran's counsel stated: "Look at him. Look at her. Then decide who is lying." Because Smith did not object to this statement during trial, we review for plain error. See Dodoo, 235 F.3d at 529. We do "not lightly infer that [counsel] intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretation." Donnelly v. Dechristoforo, 416 U.S. 637, 646-47 (1974). In its order denying Smith's motion for a new trial, the district court concluded that "any reasonable person sitting through the trial would have taken the statement as one referencing the parties divergent positions in society and the resulting credibility gap between them and not the meaning advanced by Plaintiff . . . ." Smith's own counsel at trial interpreted the statement in a similar manner. Taking into consideration the Court's admonition, we hold that the district court did not commit plain error in concluding the statement was not racially motivated. Cartier, 59 F.3d at 1050.

F

Finally, Smith maintains that the district court abused its discretion by prohibiting her from arguing, at closing, that Cochran lacked credibility because he resigned to avoid taking a polygraph examination.

In Palmer v. City of Monticello, 31 F.3d 1499, 1506 (10th Cir. 1994), we held that "[i]f it is relevant that the polygraph examination was performed, as a fact in and of itself, regardless of what the results were, then that fact may

be admissible as an operative fact." However, recognizing the substantial discretion generally afforded trial courts to make evidentiary rulings, we concluded that "[a] trial court will rarely abuse its discretion by refusing to admit [polygraph] evidence, even for [such] a limited purpose and under limited conditions" if it determines the evidence is unduly prejudicial or "the manner of the introduction of the evidence would allow or encourage the jury to draw improper inference[]" that the person is lying because they refused to submit to a polygraph examination. Id. (internal citation omitted).

Assuredly, permission was initially given to Smith's counsel to cross-examine Cochran concerning his refusal to take a polygraph examination. Nevertheless, exercising its discretion, the trial court found that undue prejudice would result from allowing Smith to argue during closing argument that Cochran resigned to avoid taking the polygraph examination, and that the jury would be encouraged to draw the improper inference that, because he did not take the polygraph examination, Cochran raped Smith.

No case law has been cited by Smith, or located by this court, holding that a district court's refusal to permit such a line of argument amounts to error. Nor does she dispute the district court's finding that admitting the evidence of Cochran's refusal to take the polygraph examination would lead the jury to draw an improper inference.[5]

---

[5]We are not persuaded by Smith's citations to United States v. Smith, 629 F.2d 650, 653 (10th Cir. 1980), and United States v. Foppe, 993 F.2d 1444, 1451 (10th Cir. 1993). These cases address whether a district court's failure to comply with Federal Rule of Criminal Procedure 30, which requires the trial court to notify the parties of its intended rulings on requested jury instructions prior to the parties' closing arguments, is reversible error. No such error is alleged in this case.

As such, the district court did not abuse its discretion.[6]

III

In addition to challenging the district court's evidentiary decisions, Smith raises two alleged procedural errors, namely the trial court's failure to enter a pretrial order and the trial court's failure to order the jury to continue deliberating before rendering a verdict in favor of Cochran. These challenges are reviewed for an abuse of discretion. See Thweatt v. Ontko, 814 F.2d 1466 (10th Cir. 1987).

In support of the first contention, Smith argues Federal Rule of Civil Procedure 16 requires a district court to sign and enter a pretrial order, and its failure to do so here was prejudicial. Rule 16(e) provides that "[a]fter any [pretrial conference] an order shall be entered reciting the action taken." Neither party has identified, and we have not found any case directly addressing whether a district court commits error by failing to formally enter a pretrial order. In Jones v. Union Indem. Ass'n of Bloomington, 287 F.2d 27, 29 (10th Cir. 1961), we noted that the district court had failed to enter a pretrial order, but, because that issue was not before us, we did not consider whether this failure was error.

---

[6]The district court apparently misread our decision Palmer for the proposition that a party is never able to present evidence that an opposing party has refused to submit to a polygraph examination. Palmer imposes no such categorical prohibition. Nevertheless, because the district court did not abuse its discretion by finding that the evidence was both unduly prejudicial and would lead the jury to draw an improper inference, the evidence was properly excluded under Palmer. Hence, Smith was not prejudiced by the district court's error.

We again need to resolve whether failure to formally enter an order is error because Smith has failed to prove she suffered any prejudice. See Fed. R. Evid. 61. Two pretrial orders were submitted by the parties for the trial court's review – an initial and revised version – and both parties were questioned by the trial judge to ensure that they did not object to the content of the orders. Smith proclaims that formal entry of a pretrial order would have "obviated some of the harpoons that were thrown into the trial." Smith has not cited, however, instance whereby Cochran attempted to introduce evidence not identified in the parties' final revised pretrial order. To the contrary, the record reveals that it was Smith who sought to admit previously undisclosed evidence in violation of the pretrial order. Given the situation presented, any error resulting from the failure to enter a formal pretrial order was not prejudicial to Smith.

As for Smith's second argument, she claims that she was unfairly prejudiced by the length of the jury deliberations of approximately one hour because the jury could not have carefully considered the evidence and applied the law in that time period. No case is identified by Smith that dictates a jury must deliberate for a specific amount of time prior to reaching a verdict, and we have never imposed such an obligation. See Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992) (holding that a party must support its argument with legal authority). The district court found that "a conscientious jury would not require an extended time" to decide this case, and it would have been improper to order the jury to further deliberate. Clearly, this ruling is not an abuse of discretion.

IV

Finally, Smith tells us that the district court erred by

denying her motion for a new trial. We review a district court's denial of a motion for a new trial for an abuse of discretion. Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1241 (10th Cir. 2000). Rule 59(a) of the Federal Rules of Civil Procedure provides a "new trial may be granted to all or any of the parties on all or part of the issues . . . in an action in which there has been a trial by jury . . . ." Such a motion is "generally not regarded with favor, and is granted only with great caution." United States v. Perea, 458 F.2d 535, 536 (10th Cir. 1972). The party seeking to set aside a jury verdict must show either trial error which constitutes prejudicial error or that the verdict was not based on substantial evidence. White v. Conoco, Inc., 710 F.2d 1442, 1443 (10th Cir. 1983). Smith has failed to demonstrate either.

To the extent that Smith is asserting the verdict is against the weight of the evidence, we disagree. Whether a verdict is against the weight of the evidence is ordinarily a question of fact, not law. Tafoya v. Sears, Roebuck & Co., 884 F.2d 1330, 1342 (10th Cir. 1989). "In reviewing a district court's denial of a motion for judgment n.o.v., we may find error only when the evidence points but one way and is susceptible to no reasonable inferences sustaining the position of the party against whom the motion is made." McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1260 (10th Cir. 1988). For failure of explanation as to why the jury's verdict was against the weight of the evidence, we rule that the district court did not abuse its discretion in rejecting Smith's challenge on

this issue.[7]

Smith also argues that she is entitled to a new trial based upon the cumulative effect of the errors we addressed above. A party moving for a new trial based upon an error of law must show not only that error occurred, but that the error affected the substantial rights of the parties. Fed. R. Civ. P. 61. Based on our holdings above, none of the alleged errors affected Smith's substantial rights. The only potential error we have identified is the district court's failure to enter a pretrial order, and we conclude that error was not prejudicial. Cumulative error analysis thus does not apply. Castro v. Ward, 138 F.3d 810, 832 (10th Cir. 1998). Zero plus zero equals zero.

VI

Because we conclude that none of the alleged errors are meritorious, we **AFFIRM.**

Entered for the Court

Carlos F. Lucero
Circuit Judge

---

[7]Because we hold that Smith has failed to prove that the jury verdict is against the weight of the evidence, we accordingly reject Smith's challenge the district court's denial of her motion for judgment notwithstanding the verdict, which requires her to satisfy the higher standard of showing that "the evidence viewed in the light most favorable to the nonmoving party points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." Sanjaun v. IBP, Inc., 275 F.3d 1290, 1293 (10th Cir. 2002).

Appendix B

IN THE *UNITED STATES DISTRICT COURT*
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

PAMELA SMITH, an individual,	)	JUL 15 2004
	)	Phil Lombardi, Clerk
Plaintiff,	)	U.S. DISTRICT COURT
	)	
vs.	)	Case No:00-CV-035-C(J)
	)	
DON COCHRAN, an individual,	)	
	)	
Defendant.)		

ORDER

Before the Court is Plaintiff's Motion for New Trial or, in the alternative, Motion For Judgment Notwithstanding the Verdict, filed on March 11, 2004. Defendant filed his Responses on March 22, 2004, and Plaintiff filed a reply brief on March 30, 2004.

I. Legal Standards

A. Motion for New Trial

Pursuant to Rule 59(a) of the Federal Rules of Civil Procedure, a "new trial may be granted to all or any of the parties on all or part of the issues . . . in an action in which there has been a trial by jury . . ." Fed. R. Civ. P. 59(a). Motions for

a new trial are committed to the sound discretion of the trial court. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984), *see also Hinds v. Gen. Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir. 1993). They are "not regarded with favor and should only be granted with great caution." *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991). A motion for a new trial "should be granted when the court believes the verdict is against the weight of the evidence, prejudicial error has occurred, or substantial justice has not been done." *Heyen v. United States*, 731 F.Supp. 1488, 1489 (D. Kan. 1990) (citing *Homes v. Wack*, 464 F.2d 86, 88-89 (10th Cir. 1971)).

A new trial based upon an error of law is unwarranted unless that error affected the substantial rights of the parties. Fed. R. Civ. P. 61. "The party seeking to set aside a jury verdict must demonstrate trial error which constitutes prejudicial error or that the verdict is not based on substantial evidence" *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir. 1983). The court should "ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equip.*, 464 U.S. at 553. Where a jury's verdict is challenged as contrary to the evidence, the court's "inquiry focuses on whether the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence." *Black v. Hieb's Enters., Inc.*, 804 F.2d 360, 363 (10th Cir. 1986) (citations omitted.)

B. Motion for Judgment Notwithstanding the Verdict

As an alternative to her motion for a new trial, Plaintiff seeks a judgment notwithstanding the verdict

under Rule 50 of the Federal Rules of Civil Procedure.[1] A Rule 50 motion for judgment as a matter of law "may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." *Jackson v. City of Albuquerque*, 890 F.2d 225, 230, (10th Cir. 1989 (citing *5A Moore's Federal Practice*, Section 50.07(s) (1986)). Judgment as a matter of law is appropriate "only if the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion," *J.I. Case Credit Corp. v. Crites*, 851 F.2d 309, 311 (10th Cir. 1988), and it "should be cautiously and sparingly granted." *Lucas v. Dover Corp.*, 857 F.2d 1397, 1400 (10th Cir. 1988) (citations omitted). "In determining whether the grant of a motion for [judgment as a matter of law] is appropriate, the court must view the evidence and indulge all inferences in favor of the party opposing the motion and cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury." *Id.* (citations omitted). Finally, "[a] motion for [judgment as a matter of law] must be predicated by a motion . . . pursuant to Rule 50(a) of the Federal Rules of Civil Procedure" before the case was submitted to the jury. *Trotter v. Todd*, 719 F.2d 346, 349-50 (10th Cir. 1983). *See also* Fed.R.Civ.P. 50 (Rule 50(a) permits a party to move for judgment as a matter of law before the case is submitted to the jury, and Rule 50(b) permits a party to move for a *renewed* judgment as a matter of law within ten

---

[1]Rule 50 of the Federal Rules of Civil Procedure does not provide for a judgment notwithstanding the verdict. Fed. R. Civ. P. 50. However, it does provide for a judgment as a matter of law. *Id.* The "judgment as a matter of law" or "JMOL," and the legal standards governing the analysis of such motions remain unchanged. *See Weese v. Schukman*, 98 F.3d 542, 547 (10th Cir. 1996). Therefore, the Court will construe Plaintiff's motion as one for a judgment as a matter of law.

(10) days of the entry of judgment.)

II. DISCUSSION

A. Exclusion of Polygraph Evidence from Closing Argument

In her Motion, Plaintiff claims the following:
On direct examination by defense counsel, Defendant Don Cochran testified that he voluntarily quit his job with the Department of Public Safety due to"medical reasons." Upon cross examination, however, Plaintiff was able to elicit testimony strongly indicating otherwise, including that:

1) In the late part of January 1999, Cochran was called to Oklahoma City as part of an investigation into the allegations lodged by Plaintiff, Pam Smith;

2) After his initial interview with the Department, he was told that he was going to be required to take a polygraph test that the Department was going to administer on the following Wednesday;

3) Cochron told the Department that he was probably going to be in the hospital and was going to be unavailable to take the polygraph test on such date;

4) The Department's response was a firm "You WILL be here Wednesday," and Cochran was ordered to submit for the

polygraph testing on such date;

5) On the day that Cochran was scheduled to take the polygraph, Cochran tendered his resignation letter and avoiding [sic] having to take the test;

6) In contradiction of his earlier testimony concerning "medical reasons, Cochran admitted that he made the decision not to take the polygraph test because his attorney at the time advised him not to take the polygraph test; and

7) The only way that Cochran could avoid taking the polygraph test was to resign his employment.

(Doc. 95, pgs. 2-3) (emphasis in original).

Contrary to Plaintiff's representations, all of this testimony was not elicited from Defendant Cochran at trial.[2] On direct examination, Defendant testified that around the time of the DPS investigation into Plaintiff's allegations, he "found

---

[2]Specifically, the testimony elicited from Defendant establishes only paragraphs 1 and 2 quoted above. Paragraphs 3, 5, 6, and 7 are not in any way established by the testimony admitted at trial. Paragraph 4 is established only to the extent that Plaintiff's counsel asked Defendant the following:

> Q. And after your initial interview with the Department you were told – as a matter of fact, you were ordered that you were going to be required to take a polygraph test; is that correct, sir?
>
> A. Yes.

(Trial Transcript, Testimony of Don Cochran, 86-87).

that [he] had some growths in [his] groin," and that he "truthfully felt like either [he] had prostate cancer or something of the sort." (Trial Transcript, Testimony of Don Cochran, 38-39). Defendant testified that he eventually found out that he did not have cancer, but he did have "surgery for a hernia, and during that procedure they decided to go ahead and take four cysts from [his] right testicle." *Id.* at 39. He went on to testify that he was "devastated" by the allegations and that he eventually resigned his position at DPS because of his "mental condition," stating "I felt I was just a mental wreck. I had a physical, something I thought was not as bad as it turned out to be, and I just did not feel like – I did not have to work." *Id.* at 41. Defendant went on to say that his resignation was not the result of any kind of agreement with anyone. *Id.* 42.

On cross-examination, Plaintiff's counsel asked whether Defendant was "ordered" by DPS to submit to a polygraph examination in DPS's investigation into Plaintiff's allegations, and Defendant testified that he was. *Id.* at 91. Plaintiff's counsel then asked Defendant whether he tendered his resignation before the date set for the administration of the exam, and Defendant testified that he did. *Id.* Finally, on re-direct, Defendant testified that his "personal lawyer" advised him not to take the polygraph exam. *Id.* at 96.

The Court allowed Plaintiff to question Defendant about the tendering of his resignation in the face of being required to submit to a polygraph exam. However, the Court ruled that no mention of the polygraph exam would be allowed during closing arguments. Grasping upon this ruling, Plaintiff argues that the Court erred in "refusing the [sic] allow Plaintiff's counsel to present arguments rebutting Defendant's claim that he quit his job for medical reasons," and cites to *U.S. v. Smith*, 629 F.2d 650 (10th Cir. 1980), in support of this proposition.

There, the Tenth Circuit Court of Appeals held that a "trial court's failure to comply with Rule 30 [of the Federal Rules of Criminal Procedure] constitutes reversible error only if the party was unfairly prevented from arguing his defense to the jury or was substantially misled in formulating his arguments." *Smith*, 629 F.2d at 653 (citing *United States v. Pommerening*, 500 F.2d 92 (10th Cir. 1974); *Whitlock v. United States*, 429 F.2d 942 (10th Cir. 1970)).[3] The Court of Appeals went on to find that the trial court's tentative decision not to give a certain jury instruction did not prevent the defendant from presenting the desired defense during closing arguments because the defendant did in fact present that defense, and the trial court, as a result, gave the instruction. *Id.*

Smith is completely inapplicable to the case at bar. As noted, the holding in *Smith*, which involved a criminal prosecution, was based on Rule 30 of the Federal Rules of Criminal Procedure. Further, Plaintiff was not prevented from presenting an argument rebutting Defendant's contention that he resigned for medical reasons. Rather, she was prevented from arguing that Defendant resigned from his position at DPS in order to avoid being required to take a polygraph test. This decision is supported by applicable case law.

> The general rule is that polygraph results are inadmissible. *See United States v. Whitt*, 718 F.2d 1494, 1501 (10th Cir. 1983); *United States v. Soundingsides*, 820 F.2d 1232, 1241-42 (10th Cir. 1987). If it is relevant that the polygraph

---

[3]Rule 30 of the Federal Rules of Criminal Procedure allows any party to request that the court give certain instructions and requires the court to inform the parties before closing arguments how it intends to rule in the requested instructions. Fed.R.Civ.P. 30.

> examination was performed, as a fact in and of itself, regardless of what the results were, then that fact may be admissible as an operative fact. However the trial court must still determine whether to admit or exclude the evidence on grounds of undue prejudice. *See Brown v. Darcy*, 783 F.2d 1389, 1397 & n. 14 (9th Cir. 1986). "[A] trial court will rarely abuse its discretion by refusing to admit [polygraph] evidence, even for [such] a limited purpose and under limited conditions." *United States v. Falsia*, 724 F.2d 1339, 1342 (9th Cir. 1983). Moreover, even if polygraph evidence would be admissible as an operative fact, the trial court may exclude it if the manner of the introduction of the evidence would allow or encourage the jury to draw improper inferences. *See Baarnier v. Szentmiklosi*, 810 F.2d 594, 596-97 (6th Cir. 1987).

Palmer v. City of Monticello, 31 F.3d 1499, 1506 (10th Cir. 1994).

In deciding not to allow Plaintiff to discuss Defendant's failure to take a polygraph examination in this case, the Court was of the opinion that to allow such a discussion would permit Plaintiff to make an end run around the general rule that polygraph tests are not admissible. It was, and is, the Court's determination that undue prejudice would result from allowing evidence of Defendant's failure to take a polygraph to be presented during closing arguments and that such a discussion would encourage the jury to draw an improper inference, i.e., that because Defendant failed to take the polygraph examination he, in fact, raped Plaintiff. If Plaintiff's argument were accepted, it would put an accused person in the

position of always having to take a polygraph test in order to prevent the implication that the refusal to do so was because of a fear of the truth being known. This determination is buttressed by Plaintiff's claim that Defendant's failure to take the polygraph examination was "one of the key components of her case . . .." (Doc. 95, pg. 3).

Plaintiff attempts to distinguish this case from *Palmer* by arguing that Defendant's alleged unwillingness to submit to a polygraph examination reflects upon his credibility, motive, and good faith in resigning his employment. She claims that the *Palmer* decision supports this distinction:

> We agree with Palmer's contention that the jury, possessed of the knowledge that polygraphs had been performed on both [Palmer's accuser] and Palmer, would have been able to figure out that [Palmer's accuser] had "passed" while Palmer had "failed." *See* Appellee's Brief at 32. That would have been an end run around the general inadmissibility of polygraph results which could have interfered with the jury's resolution of the crucial question whether Palmer falsified the ticket.
>
> This case simply is not like cases in which litigants offer to prove that they took, agreed to take, or refused to take polygraphs to demonstrate their good faith (or lack thereof), because in those cases the taking, offering, or refusal to take the tests carried independent significance. *See, e.g., Underwood v. Colonial Penn Ins. Co.*, 888 F.2d 588, 590-91 (8th Cir. 1989) (refusal to take test admissible); *Murphy v. Cincinnati Ins. Co.*, 772

> F.2d 273, 277 (6th Cir. 1985) (willingness to submit to test admissible). *But see Wolfel v. Holbrook*, 823 F.2d 970, 974-75 (6th Cir. 1987) (willingness to submit to test not automatically admissible, refusal to submit to test not admissible at all), *cert. denied*, 484 U.S. 1069, 108 S.Ct. 1035, 98 L.Ed.2d 999 (1988).

Id. at n. 8 (emphasis added).

The emphasized language, which Plaintiff cites in support of her argument, is inapposite. As in *Palmer*, this case is also "not like cases in which litigants offer to prove that *they* took agreed to take, or refused to take polygraphs to demonstratic *their* good faith (or lack thereof) . . .." *Id.* (emphasis added). Here, it was not the defendant asking to have his failure to take a polygraph exam admitted into evidence. Rather, it was the Plaintiff, and that makes it inadmissable in the eyes of this Court.

B. Plaintiff's Motion in Limine

Before trial, the Court orally granted Plaintiff's Motion in Limine, which requested that the Court limit, in any manner, "[i]nformation concerning Plaintiff's past arrest record for those crimes charged that are beyond the 10 year limitation of Federal Rule of Evidence 609(b)." (Doc. 83, pg. 1). Rule 609 disallows evidence that a witness has been convicted of a crime if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed, whichever is later. Fed. R. Evid. 609.

During the trial, a DPS employee testified that Plaintiff had told him that she could steal money from elderly people.

(Trial Transcript, Testimony of Willie Andrew Green, pg. 24-28). Defense counsel then referenced this testimony during closing arguments. Plaintiff, claiming that the Court specifically prohibited Defendant from arguing or eliciting testimony that Plaintiff had, in fact, "swindled old ladies" or a woman in a wheelchair, now alleges that Defense counsel's use of the testimony in her closing argument violated the Motion in Limine, was highly prejudicial, and exceeded the scope of remarks permitted in closing argument.

The Court disagrees. The Motion in Limine entered by the Court dealt with what Plaintiff had been convicted of doing, not what she had claimed she could do. The evidence admitted during trial and Defense counsel's closing argument concerned the latter. Further, it did not exceed the scope of what is permitted in a closing argument, as Plaintiff's statement to DPS coworker that she could steal money from elderly people had been admitted into evidence. Finally, the probative value of the evidence, that Plaintiff may have had a plan, was not substantially outweighed by its prejudice. Fed. R. Evid. 403. Therefore, the Court did not err in allowing Defense counsel to state in her closing argument that Plaintiff had made the statement that she
could steal money from elderly people.

C. Examination of Defendant as to the Number of Times he has been Married and the Circumstances under which he met his Wife

During trial, Defendant offered evidence that he had become a Christian following the death of his wife's

stepfather.[4] (Trial Transcript, Testimony of Donald Cochran, pg. 24). Plaintiff claims that she sought to rebut this character evidence by eliciting testimony showing how many times Defendant had been married and that he had begun his dating relationship with his current wife while she was still married. The Court ruled that this rebuttal evidence was inadmissible, which Plaintiff now claims was error. She argues that it was admissible as evidence rebutting a character trait offered by Defendant.

Character evidence for the purpose of proving action in conformity therewith on a particular occasion is generally inadmissible. Fed. R. Evid. 404(a). However, there are exceptions to this general rule. Rule 404(a)(1) provides for the admission of "a pertinent trait of character offered by an accused, or by the prosecution to rebut the same . . .." Fed. R. Evid. 404(a)(1). Although the literal language of the Rule 404(a)(1) exception applies only to criminal cases, it has been held that "when the central issue involved in a civil case is in nature criminal, the defendant may invoke the exceptions to Rule 404(a)." *Perrin v. Anderson*, 784 F.2d 1040, 1044 (10th Cir. 1986).

While some character evidence is admissible in this case, it must still be relevant, and any evidence offered by Plaintiff concerning Defendant's character must rebut such evidence presented by Defendant. The character evidence which Plaintiff wished to present failed to comply with both of these requirements. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of

---

[4]Again Plaintiff mischaracterizes the testimony, claiming that Defendant testified that he was a Christian man and that he loved, and was faithful to, his wife. (Doc. No. 95, pg. 4).

consequence to the determination of the action more probable or less probable than it would be with the evidence." Fed. R. Evid. 401. The Court can imagine no circumstance under which Defendant having been married multiple times or that he began dating his wife while she was still married makes it more or less probable that he raped Plaintiff. Further, even if this evidence were relevant, it in no way rebuts the character evidence offered by Defendant. Defendant became a Christian around 1996, when his wife's stepfather had died, and Plaintiff sought to rebut this evidence by offering evidence of conduct which occurred before this event, making it inadmissable as rebuttal evidence.

D. Alleged Discovery Misconduct

Plaintiff claims that in the course of the trial Defendant used transcripts prepared as a result of a DPS investigation into Plaintiff's allegations as both direct and impeachment evidence.[5] Plaintiff now claims that the use of these transcripts was improper because she had requested them in discovery and was told that, to the extent that they existed, they would be produced and that they were not subsequently produced. In her initial filing, Plaintiff brought this portion of her motion under Rule 26(e) of the Federal Rules of Civil Procedures, which places upon a party a duty to supplement discovery responses once the party becomes aware of the error or incompleteness of the response. Fed.R.Civ.P. 26(e). Rule 26(a)(1)(B) states that "a party must, without awaiting a discovery request, provide to other parties . . . a copy of, or a description by

---

[5]The Court has found no instance in which such evidence was used as direct evidence. Rather, the evidence described by Plaintiff was used only as impeachment evidence during the trial.

category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment . . .." Fed.R.Civ.P. 26(a)(1)(B) (emphasis added). As the transcripts prepared during the DPS investigation were used only as impeachment evidence, Plaintiff's Rule 26(a) objection is DENIED.

In her Reply to Defendant's Response to the present motion, Plaintiff amended her initial claim to invoke Rule 60(b)(3) of the Federal Rules of Civil Procedure. This rule provides that a district court may vacate judgment for "fraud . . . misrepresentation, or other misconduct of an adverse party." Fed.R.Civ.P. 60(b)(3). "Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances." *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990). "A party moving for relief pursuant to Rule 60(b)(3) must establish the 'alleged misconduct by clear and convincing evidence,' and this can only be done by showing that the opposing party 'acted with an intent to deceive or defraud the court, by means of a deliberate planned and carefully executed scheme.'" *Oakland Oil Co. v. Knight*, 2003 WL 22963108, Nos. 02-6028 and 03-6026, *15 (10th Cir. Dec. 17, 2003) (quoting *Yapp v. Excell Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999) (internal quotations omitted)). Plaintiff has only alleged that she requested certain documents and that they were not received. There is nothing in the docket showing that such requests were made, and Plaintiff has failed to provide the Court with evidence of any such requests or the alleged responses from Defendant, which would enable the Court to even consider whether a duty to supplement indeed existed. In fact, Plaintiff has offered no evidence to support this claim beyond her conclusory statements that

Defendant knowingly concealed evidence. Therefore, she has failed to meet her burden under both Rule 60(b)(3) nor Rule 26(c) causing her claim on this issue to fail.

E. Evidence of Plaintiff's Demeanor while Working at the DPS Facility

During trial, Defendant presented evidence of Plaintiff's demeanor while she worked at the DPS Facility. Among that offered was evidence that Plaintiff had rubbed her breasts against a co-worker and that she had danced while signing a song. (Trial Transcript, Testimony of Willie Andrew Green, pgs. 4-5; 7-9). Plaintiff claims that the Court erred in allowing Defendant to present this evidence of "Plaintiff's alleged 'promiscuous' behavior," arguing that the evidence was irrelevant and that it was inadmissible under Rule 404 of the Federal Rules of Evidence. Specifically, Plaintiff argues that consent was not in issue and that, even if it was, the evidence presented violated Rule 404 because "[evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith." Fed. R. Evid. 404(a).

Defendant counters that the evidence at issue was presented in response to evidence introduced by Plaintiff which indicated that she was a changed person as a result of the alleged rape; that she was a happy, outgoing person prior to beginning work at DPS and that after the alleged rape she became introverted, angry and depressed. Defendant also argues that the evidence rebutted testimony that Plaintiff was shy around men and that it contradicted Plaintiff's damage claims.

Initially, the Court notes that Plaintiff did not object to

the admission of this evidence at trial. A party has the obligation to object to evidence it believes is inadmissible and provide grounds for that objection at the time it is made. Here, Plaintiff did not notify the Court of her belief that the evidence presented by Defendant was inadmissible until she filed the present motion, making her objection untimely. Regardless, the evidence concerning Plaintiff's conduct while she worked at the DPS facilities was proper evidence, both to rebut testimony elicited by Plaintiff and to contradict Plaintiff's damage claims.

F. The Lack of a Pretrial Order

Plaintiff claims that the Court's failure to enter a pretrial order caused her prejudice. Neither party has presented to the Court, and the Court has not found, any precedent for a new trial being granted as a result of a court's failure to enter a pretrial order. Further, neither party raised the issue of a pretrial order not being filed during the trial, and Plaintiff does not point to anything that would have transpired differently during the trial had a pretrial order been filed. Finally, a pretrial order did in fact exist in this case. Although it was not formally entered by the Court, it was negotiated by the parties immediately prior to the trial and was referenced by the parties throughout the trial. Given this fact and the complete lack of precedent, the Court holds that the lack of an official pretrial order does not rise to a level of error requiring a new trial.

G. Alleged Use of Race During Closing Argument

Plaintiff claims that she is entitled to a new trial because Defense Counsel "interposed the issue of race into the case with the intent of disparaging Plaintiff, who is a African-American, and of fostering identification of Defendant, who is

white, with the all-white jury . . .." Although no objection was made during trial, she now argues that race was introduced by Defense Counsel's urging of the jury during closing argument to "Look at him. Look at her. Then decide who is lying."

In support of her argument, Plaintiff cites to *U.S. v. Richardson,* 161 F.3d 728 (D.C. Cir. 1998). There, the defense counsel, a Caucasian man, relied on misidentification defense, arguing that the defendant, an African-American man, resembled other men simultaneously apprehended and that the victim identified the wrong one. In an attempt to rebut this defense, the prosecutor, an African-American woman, repeated during her closing argument, "'we don't all look alike, ladies and gentlemen.'" *Richardson*, 161 F.3d at 185 (quoting 4/11/97 Tr. at 669). The defendant argued that the suggestion underlying the prosecutor's remark was that defense counsel's misidentification theory was based on a racial stereotype of the "they all look alike" variety. The government responded that the more natural interpretation of the argument was that people in general do not all look alike. The appeals court found that "there can be no gainsaying that the remark is instantly recognizable as a reference to racial stereotyping" and that "under the circumstances . . . the risk was altogether too real that a juror would take from this reference the distinct impression that the prosecutor herself believed defense counsel to be flirting with racial stereotyping in constructing his misidentification defense." *Id.* at 186. The appeals court, in reversing the defendant's conviction, concluded that the prosecutor's remark "could well have inflamed the emotions of the jury and resulted in a verdict based on something other than the evidence." *Id.* at 186-7.

This case is not dispositive on the issue before this Court. Here, the allegedly racial statement was directed towards the

credibility of the parties, not the identification of an individual. Further, defense counsel's statement to "Look at him. Look at her. Then decide who is lying," is not "instantly recognizable as a reference to racial stereotyping."

The Supreme Court has offered guidance in evaluating questionable closing arguments:

> [C]losing arguments of counsel, are seldom carefully constructed in *toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear . . .. [A] court should not lightly infer that [counsel] intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 637, 646-47 (1974).

During the trial, testimony was elicited that Plaintiff had been confined in a penitentiary and that Defendant was a former police officer and a retired fire chief. Based on this fact, any reasonable person sitting through the trial would have taken the statement as one referencing the parties divergent positions in society and the resulting credibility gap between them and not the meaning advanced by Plaintiff in the present motion.

H. The Make-Up of the Jury

Plaintiff claims that she was unfairly prejudiced by the make-up of the jury because it did not contain any individuals identifying themselves as African-Americans. Plaintiff did not object to the make-up of the jury either during or after jury

selection. Further, in her motion Plaintiff cites no case law to support her claim, and the Court, through an exhaustive search, has found none to exists. The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment forbids a prosecutor from using peremptory challenges to exclude African-Americans from jury service because of their race. *Batson v. Kentucky*, 476 U.S. 79, 89-96 (1986). *See also Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1548 (10th Cir. 1997) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991)) ("Our commitment to equal justice under law carved into stone outside the courthouse would be mocked by allowing discriminatory peremptory challenges inside. The practice not only causes the silent sting of discrimination, it 'mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.'"). This prohibition was later made applicable in civil cases. *Edmonson*, 500 U.S. at 2080-87. However, Plaintiff does not allege race-based peremptory challenges.

It has also been held that the Sixth Amendment to the United States Constitution grants a defendant in a criminal trial the right to a jury pool comprised of a fair cross-section of the community, and that there cannot be a "systematic exclusion of a distinctive group." *U.S. v. Robertson*, 45 F.3d 1423, 1439 (10th Cir. 1995), *cert. denied*, 516 U.S. 844 (1995). However, Plaintiff is not a criminal defendant, and she does not allege "systematic exclusion of a distinctive group." Plaintiff's argument is simply that because there was no self-described African-Americans on the jury panel, she was subject to prejudice. The Court does not agree.

I. Length of the Deliberation

Plaintiff 's final argument is that the amount of time in

which the jury deliberated (less than forty-five minutes) was insufficient for it to weigh all of the evidence produced at trial and to apply the legal rules provided by the Court it its instructions. In support of this argument, Plaintiff cites a California state case in which the court held that the jury, which returned deadlocked in under an hour, had not deliberated for a time sufficient to discuss the matter fully and to understand fully each other's viewpoints. *People v. Rich*, 755 P.2d 960, 1116 (Cal. 1988). This case is of no precedential value. Here, the jury was not deadlocked, but rather, it had reached an unanimous verdict. The Court is not inclined to send a jury that has reached a verdict back to reflect on whether the verdict it has reached is the correct one. During so would, in itself, be improper. Further, the case was not complicated. Ultimately, the decision came down to one of the credibility of the parties, whether the jury believed Plaintiff or Defendant. A conscientious jury would require an extended time to arrive at such a determination. As a result, the Court is not inclined to overturn the verdict based upon the length of the jury deliberation.

III. CONCLUSION

IT IS HEREBY ORDERED that Plaintiff's Motion for New Trial or, in the alternative, Motion for Judgment Notwithstanding the Verdict is DENIED.

IT IS SO ORDERED this 15th day of July, 2004.

"s/ H. Dale Cook"
HONORABLE H. DALE COOK
Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
PHIL LOMBARDI
CLERK
CLERK'S OFFICE
UNITED STATES COURT HOUSE
333 West Fourth Street, Room 411
TULSA, OKLAHOMA 74104-3881
(918) 699-4700

July 19, 2004

FILED

JUL 19 2004
Phil Lombardi, Clerk
U.S. DISTRICT COURT

TO: Counsel/Parties of Record

RE: Case No. 00-CV-35-C
Pamela Smith v. Don Cochran

This is to advise you that Judge H. Dale Cook entered the following Minute Order this date in the above case:

> The Order filed in this case on July 15, 2004, contains a clerical error. On page 16, line 17, the word "not" should be added to read: "A conscientious jury would not require an extended time to arrive at such a determination."

Please make a change to your copy of the Order and attached this minute order.

Very truly yours,

PHIL LOMBARDI, CLERK

By: "s/ B McCullough "
Deputy Clerk

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

F I L E D
SEP - 8 2003
Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAMELA SMITH, an Individual

Plaintiff - Appellee,

v.

DON COCHRAN, in both his individual and official capacity,

Defendant - Appellant.

No. 01-5085
(D.C. No. 00-CV-035-C)

A true copy
Test
Patrick Fisher
Clerk, U.S. Court of Appeals, Tenth Circuit
By
Deputy Clerk

JUDGMENT

Filed August 12, 2003

Before **EBEL,** Circuit Judge, **McWILLIAMS,** Senior Circuit Judge, and **ARMIJO,*** District Judge.

This case originated in the Northern District of Oklahoma and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk
by: "s/Audrey F. Weigel"
Deputy Clerk

---

*The Honorable M. Christina Armijo, U.S. District Court Judge, District of New Mexico, sitting by designation.

PUBLISH

FILED

United States Court of Appeals

UNITED STATES COURT OF APPEALS Tenth Circuit

TENTH CIRCUIT AUG 12 2003

PATRICK FISHER

Clerk

PAMELA SMITH,

Plaintiff - Appellee,

v.

No. 01-5085

DON COCHRAN, in both his individual and official capacity,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(D.C. NO. 00-CV-35-C)

Angela K. Berglan, Assistant Attorney General (Linda Soper, Assistant Attorney General, on the briefs), Oklahoma City, Oklahoma, for Defendant-Appellant.

N. Kay Bridger-Riley (Christopher L. Camp and Charles A. McSoud, with her on the briefs) of Bridger-Riley & Associates, P.C., Tulsa, Oklahoma, for Plaintiff-Appellee.

Before **EBEL**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **ARMIJO**,* District Judge.

EBEL, Circuit Judge

---

*The Honorable M. Christina Armijo, U.S. District Court Judge, District of New Mexico, sitting by designation.

Defendant Don Cochran appeals the district court's denial of qualified immunity in this 42 U.S.C. § 1983 action. Plaintiff Pamela Smith brought this action in the United States District Court for the Northern District of Oklahoma alleging violation, inter alia, of her Eighth Amendment right to be free from the use of excessive force against her. We have jurisdiction pursuant to 28 U.S.C. § 1291, see Mitchell v. Forsyth, 471 U.S. 511, 525 (1985), and AFFIRM.

BACKGROUND

During the period covering the incidents alleged in her complaint, November 1997 through August 1998, Pamela Smith was a prisoner of the State of Oklahoma and housed at the Tulsa Community Correctional Center ("TCCC"). A condition of incarceration at the TCCC was that inmates had to participate in work programs, and the Oklahoma Department of Corrections was a party to Prisoners Public Works Project Contracts with employers that arranged jobs for TCCC inmates. Because the TCCC was a relatively low-security facility, its inmates worked at jobs in the community that were covered by work project contracts, but they returned to TCCC after work each day and remained confined there when not working.

The Oklahoma Department of Corrections had a work project contract with the Oklahoma Department of Public Safety ("DPS") under which inmates would perform janitorial services at two driver license examination centers run by the DPS in the Tulsa area, known as the Jenks and the Northside centers. Smith was assigned to the DPS project and primarily worked at the Northside center. Ed Spencer, a Senior License Examiner and the DPS supervisor for the Jenks and Northside centers, would pick up Smith at the TCCC each work day and bring her to one of the DPS centers. The defendant, Don

Cochran, was a DPS employee and a License Examiner during the period covering the incidents alleged in the complaint, and from November 1997 until June 1998 he worked primarily at the Northside DPS examination center.

Under the terms of the works project contract, the Department of Corrections agreed to provide prisoners to the DPS for "clerical, maintenance, mechanical and in general other similar work as the need arises." DPS, however, did not have complete discretion in its use of the prisoners. DPS supervisors could only assign prisoners to jobs on public property, could not permit prisoners to operate motor vehicles, had to report unsatisfactory job performance and rule infractions to the Department of Corrections, and had to cooperate with Department of Corrections policies and procedures regarding monitoring prisoners and security.

Although the Department of Corrections retained "full jurisdiction and authority over discipline and control of the prisoners," the contract required the Department of Corrections to provide DPS with copies of relevant operational policies and procedures that DPS was to enforce. Under the applicable Department of Corrections rules, the prisoners were prohibited from using alcohol or drugs, engaging in sex, receiving visitors, using the telephone, or leaving the DPS facility, except to return to TCCC. The Department retained the right to conduct unscheduled inspections of the work sites to monitor compliance with the terms of the contract.

As the supervisor for both the Jenks and Northside centers, Spencer split his time between them and frequently was not present at the Northside center. According to Cochran, he sometimes "wouldn't see [Spencer] for days" at the Northside center. When he was at the Northside center,

Spencer would personally check on Smith four or five times during the day, and when Spencer was not there "[u]sually there would be someone watching [the prisoners]. According to Smith, Cochran acted as the supervisor at the Northside center when Spencer was not there. Spencer and Cochran were the only DPS personnel to attend a training session held by Department of Corrections personnel to instruct them in proper supervision of prisoners working at the Jenks and Northside DPS testing centers.

Smith alleges that Cochran repeatedly subjected her to unwanted sexual acts between November 1997 and May 1998. She alleges that in November 1997, during the first week that she worked at the Northside facility, Cochran made a comment to her about the size of her breasts. Then, while they were alone together in a store room, Cochran allegedly told Smith that she "need[ed] to do something to make him trust [her]" and asked her to expose herself to him. Smith claims that she exposed herself because Cochran threatened to report to prison officials that Smith's brother had visited her at the Northside center, which violated the rules imposed by the Department of Corrections on her custody while working at the center. Smith also claims that Cochran forced her to have sexual intercourse with him during her first two weeks on the job. Cochran denies ever having had a sexual relationship with Smith.

Smith alleges that Cochran forced her to have intercourse with and perform oral sex upon him several times between November 1997 and May 1998. She alleges that the incidents that occurred during that period included Cochran giving her a condom and suggesting that it would be for his later use, and his raping her with a salt shaker. Smith also alleges that Cochran told her that two other female prisoners from TCCC who had worked at the Northside center had

exposed themselves to him. Smith says that she confirmed this with one of the women that Cochran named.

Cochran admits that during this period he took Smith off DPS grounds for trips and to visit her family, and Smith alleges that he also permitted her to leave the premises for other purposes and to receive gifts from family and friends. Smith alleges that Cochran would remind her that she was breaking the rules, and if she did not have sex with him he would report her misconduct. This would have had the likely result that she would be transferred out of the work program and transferred from the TCCC to a higher security correctional facility.

Smith claims that, while she was working at DPS, she reported to Spencer that Cochran was making inappropriate sexual comments to women at the Northside center and that he had given her a condom. Smith first informed Department of Corrections officials of Cochran's alleged misconduct in September 1998, after she had been transferred to another correctional facility and was no longer working for DPS. Department of Corrections personnel informed Spencer of the allegations, and the DPS commenced an internal affairs investigation into Cochran's conduct. Cochran resigned from DPS before the internal affairs investigation was completed for reasons he says were unrelated to the investigation.

After she was transferred from the TCCC, Smith claims she sought medical treatment for vaginal pain she says was caused by Cochran's alleged use of a salt shaker to rape her and psychological counseling to treat the emotional trauma she claims to have experienced as a result of Cochran's alleged sexual abuse.

In January 2000, Smith filed the instant lawsuit against

Cochran in his individual and official capacities.[1] Her complaint advances three causes of action, charging Cochran with violations of 42 U.S.C. § 1983 and with the commission of the state law torts of sexual assault and battery and intentional infliction of emotional distress. As part of her § 1983 allegation, Smith claims that while acting under color of state law, Cochran violated rights guaranteed to her under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Cochran moved for partial summary judgment on the § 1983 and the intentional infliction of emotional distress causes of action. While accepting as true for the purposes of his motion Smith's allegations of sexual abuse, Cochran argued that those allegations did not support a § 1983 cause of action and he was entitled to judgment as a matter of law. In addition, he argued that even if Smith's allegations amounted to constitutional violations on his part, he was entitled to qualified immunity because the constitutional violations he was alleged to have committed were not clearly established at the time he is supposed to have committed them.

The district court denied Cochran's motion for summary judgment. It construed Smith's § 1983 claim as being based solely on the Eighth Amendment violation because, although Smith also invoked the Fourth, Fifth, and Fourteenth Amendments in her complaint, she failed to frame arguments

---

[1]In the original complaint, Smith also named Spencer and the Oklahoma Department of Public Safety as defendants. These defendants were dropped from the suit pursuant to a stipulation by all parties. Order of May 9, 2001, at 1 n.1.

concerning them.[2] The district court concluded first that Smith's allegation of repeated sexual assault by a state employee who acted as her supervisor in a prison work program sufficiently alleged a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. Second, the district court found that Cochran's actions were done under color of state law because they allegedly occurred while he was acting as a state employee. Because the district court concluded that Smith had shown that Cochran committed a constitutional violation while acting under color of state law, the court ruled that the § 1983 allegations survived summary judgment. In addition, the court denied summary judgment on Cochran's claim of qualified immunity because it found that the constitutional violation Smith alleged was clearly established at the time of the claimed violation. Finally, the district court denied summary judgment on the cause of action for intentional infliction of emotional distress.

Cochran appeals the district court's denial of his motion for summary judgment. He confines his appeal to the district court's denial of summary judgment on the issue of qualified immunity. Cochran contends that, even taking Smith's allegations as true, Smith has not shown that he violated a constitutional right that was clearly established at the time of the alleged violation. Because Smith did not make this

---

[2]The parties limited their arguments in their opening briefs on appeal to the issues of the alleged Eighth Amendment violation. We subsequently ordered supplemental briefing on whether Smith alleged facts establishing a violation of her substantive rights under the Due Process Clause of the Fourteenth Amendment. Because we resolve this case on Eighth Amendment grounds, and the Eighth Amendment is the proper vehicle for evaluating excessive force claims involving prisoners, we do not address the parties' due process arguments. See Whitley v. Albers, 475 U.S. 312, 327 (1986).

showing, Cochran argues, the district court erred in denying his summary judgment motion on the issue of qualified immunity and urges that we reverse the district court's decision.

After Cochran commenced this appeal, we ordered briefing on whether the district court's order could be reviewed through this interlocutory appeal. Because Cochran argues that he is entitled to qualified immunity under the plaintiff's version of the facts, focusing on the legal issue whether the constitutional right he allegedly violated was clearly established, we conclude that we have jurisdiction to hear this appeal. DeAnzona v. City & County of Denver, 222 F.3d 1229, 1233-34 (10th Cir. 2000) ("If the defendant argues that she is entitled to qualified immunity under the plaintiff's version of the facts because the plaintiff has not demonstrated a violation of clearly established law, this Court may properly exercise jurisdiction over an interlocutory appeal."). We emphasize that "'immunity appeals . . . [are] limited to cases presenting neat abstract issues of law..'" Clanton v. Cooper, 129 F.3d 1147, 1153 (10th Cir. 1997) (quoting Johnson v. Jones, 515 U.S. 304, 317 (1995).

DISCUSSION

Government officials are entitled to qualified immunity from liability for civil damages under § 1983 when their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Our review of a denial of a summary judgment motion raising qualified immunity questions is conducted de novo. Holland ex rel. Overdorff v. Harrington,

268 F.3d 1179, 1185 (10th Cir. 2001).

"Because of the underlying purposes of qualified immunity, we review summary judgment orders deciding qualified immunity decisions differently from other summary judgment decisions." Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir. 2001). "After a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff, and the plaintiff must first establish that the defendant's actions violated a constitutional or statutory right." Harrington, 268 F.3d at 1185 (internal quotation marks omitted). "If a 'favorable view' of the facts alleged show the violation of a constitutional right, 'the next, sequential step is to ask whether the right was clearly established' at the time of the defendant's unlawful conduct." Id. at 1186 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001). When "the plaintiff fails to satisfy either part of this two-part inquiry, the court must grant the defendant qualified immunity." Id. However, "[i]f the plaintiff successfully establishes the violation of a clearly established right, the burden shifts to the defendant, who must prove 'that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.'"[3] Medina, 252 F.3d at 1128 (quoting Hinton v. City of Elwood, 997 F.2d 774, 779 (10th Cir. 1993)) (internal quotation marks omitted).

1. The Alleged Violation of the Eighth Amendment

We turn first to whether Smith has established that Cochran's actions violated the Eighth Amendment. The Eighth

---

[3]This last element of the burden-shifting framework for summary judgment on questions of qualified immunity, although part of the analysis that must be conducted by the district court, is not relevant here. Cochran focuses his appeal on the pure legal issue whether or not Smith has shown that he violated a clearly established constitutional right.

amendment states that "[e]xcessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Supreme Court has said that the use of excessive force against a prisoner can violate the Eighth Amendment, stating that "'the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" Whitley v. Albers, 475 U.S. 312, 319 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)) (internal quotation marks omitted); Hudson v. McMillian, 503 U.S. 1, 5-6 (1992). Smith claims that Cochran violated her right to be free from cruel and unusual punishment by using excessive force against her in the form of rape and sexual abuse.

"Ordinarily, an excessive force claim involves two prongs: (1) an objective prong that asks "if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation,' and (2) a subjective prong under which the plaintiff must show that 'the officials act[ed] with a sufficiently culpable state of mind.'" Giron v. Corrections Corp. of America, 191 F.3d 1281, 1289 (10th Cir. 1999) (quoting Hudson, 503 U.S. at 8) (internal quotation marks omitted) (alteration in original). The objective component of an excessive force claim is "contextual and responsive to contemporary standards of decency." Hudson, 503 U.S. at 8. "The subjective element of an excessive force claim 'turns on whether force was applied in a good faith effort to maintain or restore discipline or malicious and sadistically for the very purpose of causing harm.'" Giron, 191 F.3d at 1289 (quoting Whitley, 475 U.S. at 320-21).

Sexual abuse is repugnant to contemporary standards of decency and allegations of sexual abuse can satisfy the objective component of an Eighth Amendment excessive force

claim. We have expressly acknowledged that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards." Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993). The right to be secure in one's bodily integrity includes the right to be free from sexual abuse. See Barney v. Pulsipher, 143 F.3d 1299, 1310 (10th Cir. 1998) (holding that "plaintiffs' deprivations resulting from the sexual assaults are sufficiently serious to constitute a violation under the Eighth Amendment."). We find that Smith's allegation of sexual abuse by Cochran identifies acts that satisfy the objective prong of Smith's excessive force claim. She states in her deposition testimony and in an affidavit that Cochran forced her to expose herself to him and that he raped her on several occasions, including once with a salt shaker.

Smith's allegations also satisfy the subjective prong of an excessive force claim. In cases of sexual abuse or rape, "the conduct itself constitutes sufficient evidence that force was used 'maliciously and sadistically for the purpose of causing harm.'" Giron, 191 F.3d at 1290 (quoting Whitley, 475 U.S. at 320-21). "[S]exual abuse of a prisoner by a corrections officer has no legitimate penological purpose, and is simply not part of the penalty that criminal offenders pay for the offenses against society." Id. (internal quotation marks omitted); Boddie v. Schneider, 105 F.3d 857, 861 (2d Cir. 1997) (finding that the sexual abuse itself may be sufficient evidence of a culpable state of mind). Because there can be no legitimate purpose for the sexual abuse and rape alleged by Smith, her allegations satisfy the requirement that she show Cochran acted maliciously and sadistically.

Cochran contends, however, that even if we take Smith's allegations as true, his alleged rape and sexual abuse of Smith does not implicate the Eighth Amendment because the

Amendment acts as a restraint only on the acts of prison guards or prison officials. He characterizes his relationship with Smith as being merely that of a co-worker to whom the Eighth Amendment does not apply. We find this line of argument unavailing. Although we do agree that the scope of the Eighth Amendment is limited, it is not so limited as to be inapplicable to a person in Cochran's position.

In explaining the scope of the Eighth Amendment, the Supreme Court has said that "[t]he primary purpose of [the Cruel and Unusual Punishment Clause] . . . has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes . . . ." Powell v. Texas, 392 U.S. 514, 531-32 (1968). The purpose of the Amendment indicates that it contains a limitation on what types of state actors can violate it. The Supreme Court has instructed that "the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." Ingraham v. Wright, 430 U.S. 651, 664 (1977) (emphasis added). Consistent with this teaching, we conclude that only prison officials and those to whom they delegate penological responsibilities for prisoners have Eighth Amendment duties and attendant liabilities.

The fact that Cochran was not a prison guard or prison official per se does not render the Eighth Amendment inapplicable to him. Important penological responsibilities were delegated to him as an employee of the DPS. One of the Oklahoma Department of Corrections's core penological functions is supervising the behavior of the inmates in the custody of its prison system, and another penological function embraced by the TCCC was to provide job experience to some of its inmates. The Department of Corrections delegated a portion of these responsibilities to the DPS by

entrusting DPS personnel, pursuant to the terms of a contract, to supervise the activities of Oklahoma state prisoners who were permitted to work at DPS. We conclude that those acting under that delegated authority also bore the duty under the Eighth Amendment to refrain from using excessive force against prisoners.

Cochran argues that the Department of Corrections did not, in fact, delegate any supervisory authority to DPS. The works project contract did state, as Cochran emphasizes, that the Department of Corrections would retain "full jurisdiction and authority over discipline and control of the prisoners." We do not, however, read this provision as saying that DPS personnel had no supervisory duties under the contract. The provision is better understood as preventing the DPS from substituting its own disciplinary standards for those of the Department of Corrections when supervising prisoners and as making clear that, even though a prisoner was off the grounds of the TCCC while at work, he or she was still subject to the control of state penal authorities. In fact, the contract invoked a state law that extends, as a legal matter, the boundaries of the prisoner's place of confinement to the site of the prisoner's public works project. Okla. Stat. Ann. tit. 57, § 510.1(A)(4) ("The Department of Corrections may extend the limits of the place of confinement of a committed offender at any of the state correctional facilities . . . [t]o participate in public works projects.")

Thus, under Oklahoma law, Smith was effectively in prison even as she worked at DPS. Pursuant to Okla. Stat. Ann. tit. 57, § 510.1(F), a prisoner who is away from the Department of Corrections facility where he is incarcerated "is, during his absence, to be considered as in the custody of the correctional facility and the time of such absence is to be considered as part

of the term of sentence." Construing the meaning of this provision in Hunt v. Oklahoma, 793 P.2d 1366 (Okla. Crim. App. 1990), the Oklahoma Court of Criminal Appeals said:

> This section clearly provides that the inmate remains in custody and is honor bound to return from his excursion outside the prison walls. The inmate is continuously "restrained" from exercising his liberty in any manner other than that approved by the penal institution. While outside the boundaries of the institution to which he is confined, the inmate is fully aware that he is not free to do as he pleases and that any deviation from the terms of his [absence] will result in prosecution.

Id. at 1368.

We therefore conclude that, pursuant to the terms of the contract governing the prisoner works program, DPS personnel effectively acted as agents of the Department of Corrections in monitoring Smith while she was away from the TCCC but restrained and in state custody on the DPS premises. As the district court found, "[b]y reason of their significant engagement in performing the contract between [the Department of Corrections] and DPS, these DPS surrogates [i.e., DPS employees] perform the jobs for which [Department of Corrections officers are chartered."[4] Am. Order of May 9, 2001, at 17. DPS personnel were required to enforce the Department of Corrections rules prohibiting prisoners from using alcohol or drugs, engaging in sex, receiving visitors,

---

[4]The district concluded that Cochran acted as a "de-facto guard" with respect to Smith.

receiving gifts, using the telephone, or leaving the DPS facility, except to return to the TCCC. DPS personnel were required to report violations of the rules to the Department of Corrections and to cooperate with Corrections officials in monitoring the prisoners and implementing security policies. And the contract permitted Department of Corrections officials to make unannounced visits at DPS facilities to ensure that DPS personnel were complying with the terms of the contract.

Moreover, at the time when the sexual abuse alleged by Smith took place, Smith said that Cochran was the only supervisor present at the Northside center. Although Cochran argues that he was not authorized by his superior to act as a supervisor over Smith, Smith's allegations, which Cochran agrees we must take as true for purposes of considering his interlocutory appeal, indicate that he in fact acted as a supervisor over her. She stated that Cochran "was the man running the place up there when Ed [Spencer] wasn't there." When she broke the rules of her custody by leaving the Northside center premises and by visiting with family and friends there and receiving cash and gifts from them, Smith claims she did so "with Don Cochran's permission." From these alleged facts, and from Spencer's frequent absence from the Northside center and the fact that Cochran was the only DPS employee besides Spencer to be trained in prisoner supervision by the Department of Corrections, we draw the reasonable inference, as we are permitted to do, Verdecia v. Adams, 327 F.3d 1171, 1174 (10th Cir. 2003), that Cochran had responsibility for administering the conditions of Smith's custody while she worked at the Northside center.

We conclude that the contract between the Department of Corrections and the DPS delegated to the DPS one of its core penological functions: supervising Smith's compliance with

Department of Corrections disciplinary policies during extended periods of her custody. Cochran as an employee of DPS who acted as a supervisor over Smith, exercised the authority delegated by the Department of Corrections. Because Cochran wielded authority over Smith that was delegated by the state prison authority in the state's exercise of its penological functions, we hold that the use of excessive force by him can constitute a violation of the Eighth Amendment, and that Smith has met her burden under our standard of review for summary judgment orders deciding qualified immunity claims of showing that Cochran violated her constitutional right.

II. Whether the Eighth Amendment Right was Clearly Established

We next turn to the issue whether Smith has met her burden of showing that the violation of her Eighth Amendment right was clearly established. Harrington, 268 F.3d at 1186. "In showing that the law was clearly established, the plaintiff does not have to show that the specific action at issue had been held unlawful, but that the alleged unlawfulness of the defendant's conduct must be apparent in light of preexisting law." Armijo v. Wagon Mound Public Schools, 159 F.3d 1253, 1260 (10th Cir. 1998). In other words, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. A plaintiff may meet the burden of making this showing by pointing to "a Supreme Court or Tenth Circuit opinion on point, or that his or her proposition is supported by the weight of authority from other courts. However, we do not require plaintiffs to produce a factually identical case, but allow some degree of generality in factual correspondence." Id.

It is clearly established that prison guards employed by

the state can be liable under the Eighth Amendment for using excessive force against prisoners in the form of sexual abuse. See Barney, 143 F.3d at 1310 ("Clearly plaintiffs' deprivations resulting from the sexual assaults are sufficiently serious to constitute a violation under the Eighth Amendment."); Hovater, 1 F.3d at 1068 (stating that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards"). In determining what state employees may act as prison guards, we employ a common-sense, self-evident definition: prison guards include those government employees who have among their official responsibilities supervisory or custodial responsibilities for prisoners. Indeed, Cochran himself equates the role of prison guard generally with being a prisoner's custodian, and he says that "[a]s an inmate, Smith had a constitutional right under the Eighth Amendment to be protected by her custodian." Aplt. B. at 10 (emphasis in original).

Moreover, persons to whom the state delegates its penological functions, which include the custody and supervision of prisoners, can be held liable for violations of the Eighth Amendment. Cf. Evans v. Newton, 382 U.S. 296, 299 (1966) ("W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."); West v. Atkins, 487 U.S. 42, 57 (1988) (holding that a private doctor treating prisoners under a contract with state prison authorities acted under color of state law for purposes of § 1983 suit alleging Eighth Amendment violation); Richardson v. McKnight, 521 U.S. 399, 412-13 (1997) (holding that prison guards employed by a private prison are not entitled to qualified immunity from suits under § 1983, but that whether the private defendants acted under color of state law in violation of § 1983 was a

matter to be determined by the district court); Dellis v. Corrections Corp. of Am, 257 F.3d 508, 512 (6th Cir. 2001) (holding that plaintiff adequately stated claim under Eighth Amendment against a private prison and personnel employed there); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991) (holding that a private prison under contract with state acted under color of state law for purposes of § 1983 suit alleging violations of the Eighth Amendment); Ancata v. Prison Health Svcs., 769 F.2d 700, 703 (11th Cir. 1985) (holding that a private medical service responsible for treating state prisoners engaged in state action subjecting it to suit under § 1983 because it performed "a function which is traditionally the exclusive prerogative of the state"); Mauldin v. Burnette, 89 F. Supp. 2d 1371, 1376 (M.D. Ga. 2000) (holding the defendant, a private person to whom plaintiff, a prisoner, was entrusted on work release, potentially liable under § 1983 for constitutional violations because defendant "was authorized by [the county] . . . to sign an inmate out of jail, supervise him throughout the week, maintain discretion and authority over his actions and behavior, and then return him to . . . jail [and that] all of these actions are custodial in nature"). In his supervisory position over Smith, Cochran acted as the functional equivalent of a prison guard. He was an employee of the state who, pursuant to a contract with the Department of Corrections, was responsible for administering the conditions of Smith's confinement during her work day at the Northside center. Under the contract with the Department of Corrections, DPS was required to enforce the rules of conduct for prisoners and report violations, and at the time of the alleged sexual abuse, Cochran was the only DPS supervisor present at the Northside center. We hold that because Smith acted as the functional equivalent of a prison guard by virtue of the penological responsibility delegated to the DPS by the State, "the alleged unlawfulness of the defendant's conduct [was] . . . apparent in

light of preexisting law." Armijo, 159 F.3d at 1260.[5]

CONCLUSION

We conclude that Smith has carried her burden of showing that the Cochran violated her constitutional right to be free from the use of the excessive force against her and that the right was clearly established at the time of the alleged violation. Accordingly, Cochran is not entitled to qualified immunity and we AFFIRM the decision of the district court denying Cochran's motion for summary judgment on that issue.

---

[5]For the purposes of this appeal, we have accepted as true Smith's allegations that Cochran in fact had supervisory authority over her. As our opinion makes clear, Cochran must have possessed custodial or supervisory authority over Smith in order for him to be liable under § 1983 for the alleged Eighth Amendment violation. Whether he did possess such authority at the time of the alleged sexual abuse is a factual matter to be determined at trial.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

PAMELA SMITH, an individual,	)	May -7 2001
	)	Phil Lombardi, Clerk
Plaintiff,	)	U.S. DISTRICT COURT
	)	
vs.	)	Case No: 00-CV-0035 C
	)	
DON COCHRAN, an individual,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the motion for summary judgment filed by the defendant and counter-motion for partial summary judgment filed by plaintiff pursuant to Fed.R.Civ.P. 56. Both parties contend that there exists no genuine issue of material facts and that they are both entitled to summary judgment as a matter of law.

On January 13, 2000, plaintiff Pamela Smith ("Smith") filed the present action in United States District Court in the Northern District of Oklahoma against State of Oklahoma, ex. rel, Department of Public Safety, Don Cochran, in both his individual and official capacity, and Ed Spencer, in both his

individual and official capacity.[1] The suit was filed under federal question jurisdiction, pursuant to 28 U.S.C. § 1331, and pendent jurisdiction for a state claim. The requested relief arises under 42 U.S.C. § 1983, and the supplemental jurisdiction of this Court.

On March 15, 2001, Cochran filed his motion for summary judgment. Smith filed her response on April 5th and filed a counter-motion for partial summary judgment contemporaneously on that date.[2] Eleven days later, Cochran filed a reply to his motion for summary judgment and a response to Smith's counter-motion for summary judgment.[3] All materials regarding defendant's motion for summary judgment have now been submitted, and the matter is ripe for ruling.

Undisputed Statement of Facts

1. Smith was an inmate in the custody of the Oklahoma Department of Corrections ("DOC") from August 1996 until September 2000.

2. From September 1997 to August 1998, Smith was

---

[1]The Court notes that since the original complaint was filed, both parties have stipulated that all parties except for Don Cochran, in his individual capacity, should be dismissed from the lawsuit.

[2]The Court views Smith's "Counter-Motion for Partial Summary Judgment on the Issue of Qualified Immunity" as merely a response to Proposition II of Cochran's Motion for Partial Summary Judgment regarding qualified immunity; and thus, only one motion is before the Court.

[3]The Court views Cochran's "Response to Plaintiff's Counter Motion" as merely part of the reply to his original "Motion for Partial Summary Judgment."

housed at the Tulsa Community Correction Center ("TCCC").

3. DOC entered into a Prisoner Works Project Contract ("PWP") wherein trustees/ inmates at the TCC would be provided to the Oklahoma Department of Public Safety ("DPS") to perform janitorial services at the two drivers license examination centers in the Tulsa area.

4. The PWP was initiated in 1993 and renewed each year thereafter.

5. The PWP provided that DOC has the ultimate responsibility for the security of prisoners and prisoners are deemed to be on trustee status and under the custody and control of the DOC.

6. While Smith was housed at TCCC, Smith was a trustee/inmate allowed to leave TCCC during the day and perform certain assignments. Smith was assigned to an "outside" job at Wells Fargo picking up trash during September and October of 1997. Due to medical problems DOC reassigned Smith as a trustee at DPS. From November 1997 to August 1998, she performed janitorial duties for DPS.

7. As a janitor/trustee, Smith performed janitorial duties at the DPS facilities located in Jenks and Northside Tulsa, although she performed the majority of her duties at the Northside facility.

8. Ed Spencer, a Senior Drivers' License Examiner for DPS and supervisor over both facilities, transported Smith from TCCC to the DPS facility each day where he wanted her to perform janitorial duties. Normal work time for the trustee/janitors was Monday through Friday, between the hours

of 8:00-8:30 a.m. until 4:00-5:00 p.m.

9. Cochran was an employee at DPS as driver's license examiner from December 1987 until February 1999 when he voluntarily resigned.

10. From November 1997 until June of 1998, Cochran was primarily located at the Northside Tulsa facility.

11. Among the rules provided to DPS, were that inmate/trustees were to have no alcohol, no drugs, no sex, no use of the telephone without permission, no visitors, and no leaving the DPS facility, other than to return to TCCC.

12. Cochran allowed Smith preferential treatment to include telephone privileges, visitors, shopping, and family visits. Cochran transported Smith to homes of friends and family and to go shopping.

13. Previously a driver's license applicant made a complaint against Cochran for his personal comments.

14. From approximately June until August, Smith alleges that Cochran commented to her regarding the size of her breasts. Smith also alleges that shortly thereafter Cochran told Smith she needed to do something to prove he could trust her.

15. Although Cochran denies ever having a sexual relationship whatsoever with Smith, she alleges that within the first two weeks she was a trustee at the Northside facility, that she engaged in sexual intercourse with Cochran.

16. Smith alleges that at least once a month, from November of 1997 until May of 1998, Smith engaged in sexual intercourse

and fellatio with Cochran.

17. Smith alleges that if she refused to perform sex with Cochran or reported his conduct, she would have lost her special privileges and bee removed from PWP.

18. Smith alleges that Cochran gave Smith a condom for the subsequent intention of having sex in January of 1998 and three months later raped Smith with a salt shaker.

19. Smith alleges that on two occasions prior to these events, Cochran forced other female inmate/trustees to show him their naked bodies.

20. During his time as an employee at DPS, Cochran knew that it was a crime to have sex with an inmate.

21. In August of 1998, Smith was transferred to Eddie Warrior's Correctional Center (EWCC) in Taft, Oklahoma and was housed there until September 2000.

22. Since her release from EWCC, Smith sought both medical and psychological counseling.

Allegations of the Parties

Smith contends that while working for DPS as an inmate, she was exposed to comments of sexual nature, and sexually assaulted and battered on numerous occasions by Cochran. She maintains that Cochran used his position of authority, as a DPS employee, to engage in sexual intercourse and fellatio with Smith. Smith further alleges that she reported to DPS supervisor, Ed Spencer, that Cochran had been making salacious remarks to Smith and in one instance, had given

Smith a condom for later use. Cochran denies any wrongdoing and specifically denies ever having any sexual relationship with Smith.

Smith asserts that Cochran violated her right to liberty and due process of law under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, giving rise to a 42 U.S.C. § 1983 ("§ 1983") claim.

Standard of Review

In considering a motion for summary judgment, the court "has no real discretion in determining whether to grant summary judgment." U.S. v. Gammache, 713 F.2d 588, 594 (10th Cir. 1983). The Court must view the pleadings and documentary evidence in the light most favorable to the nonmovant, Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 527-28 (10th Cir. 1994), and summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Akin v. Ashland Chemical Co., 156 F.3d 1030, 1034 (10th Cir. 1998). Further, "'the moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment.'" Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991) (quoting Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir. 1987)). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The

"party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citations omitted).

42 U.S.C. § 1983

As an initial matter, the Court turns to Cochran's contention that Smith's claims are "vague and conclusory without providing substance of the right." See Cochran's Motion for Summary Judgment, 7. Cochran argues that Smith's failure to plead with particularity in regard to the constitutional deprivation, that serves as the underlying basis for the § 1983 claim, should justify a summary judgment in his favor. The Court views Cochran's argument as a reference to the "heightened pleading" requirement traditionally used in § 1983 claims with qualified immunity affirmative defenses.[4] However, the Tenth Circuit has since abolished the use of this requirement as a result of the Supreme Court's decision in Crawford-El v. Britton, 523 U.S. 574 (1998). See Currier v. Doran, et al., 242 F.3d 905 (10th Cir. 2001). The Federal Rules of Civil Procedure require "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Having complied with this requirement, Smith provided Cochran with the required fair notice of what her claim was and the ground on which it rested. See Id. Thus, the court finds Smith's pleadings sufficient in accordance with the Federal Rules.

---

[4]See Bricdenbach v. Bolish, 126 F.3d 1288, 1292 (10th Cir. 1997) (explaining that the "heightened pleading" requirement went beyond traditional notice pleading to requiring a demonstration of all of the factual allegations necessary to assert that a defendant violated plaintiff's constitutional rights).

Smith's complaint asserts a federal claim for violation of 42 U.S.C. § 1983, and two pendent state causes of action, specifically a sexual battery claim, and intentional infliction of emotional distress claim. The purpose of § 1983 is to deter state actors from using their positional authority to deprive individuals of their constitutional guaranteed rights and to provide a remedy to victims if such deterrence fails. See Wyatt v. Cole, 504 U.S. 158, 161 (1992). Section 1983 is not a source of substantive rights, but instead merely provides a vehicle for vindicating federal rights conferred elsewhere. See Albright v. Oliver, 510 U.S. 266, 271 (1994).

To prevail on a § 1983 claim, the plaintiff must prove that a person acting under the color of state law deprived her of a right secured by the Constitution or laws of the United States. See American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999). Cochran argues that Smith's § 1983 claims must fail because he is not a state actor and did not operate under color of law, which is a jurisdictional requisite for a § 1983 action. See Polk County v. Dodson, 454 U.S. 312, 315 (1981), Pino v. Higgs, 75 F.3d 1461, 1464 (10th Cir. 1996). In this respect, Cochran contends that Smith cannot satisfy any of the four tests identified by the Supreme Court and Tenth Circuit for use in determining whether challenged conduct occurs under color of state law.[5]

It is well settled that for a § 1983 claim to exist, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States. See West v. Atkins,

---

[5]These tests are known as 1) the nexus test, 2) the symbiotic relationship test, 3) the joint activity test, and 4) the public function test. See Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995).

487 U.S. 42, 48 (1988). In this case, Smith originally alleged a violation of her rights under the Fourth, Fifth, Eighth[6] and Fourteenth Amendments of the United States Constitution and a violation of state law. Cochran argues that no constitutional violation occurred and that a state law violation cannot stand as the basis for § 1983 violation.

Constitutional or Federal Law Violation

In the motion for summary judgment, response, and reply briefs, both parties argue about whether the conduct rises to the level of an Eighth Amendment violation. Although Smith invoked the Fourth, Fifth, and Fourteenth Amendments in her complaint and never attempted to frame arguments concerning them, "her claim remains bounded by the Eighth Amendment, the 'explicit textual source of constitutional protection,' Graham v. Connner, 490 U.S. 386, 395 (1989) in the prison context." Adkins v. Rodriquez, 59 F.3d 1034, 1037 (10th Cir. 1955). The allegations of cruel and unusual punishment and of excessive force implicate prisoners' rights under the Eighth Amendment of the Constitution. See Cain v. Rock, 67 F.Supp.2d 544 (D.Md. 1999). This individual right governs both the treatment prisoners receive while incarcerated and the conditions of confinement, See Farmer v. Brennan, 511 U.S. 825, 832 (1994), requiring humane conditions and an environment of safety.[7] See Hudson v. Palmer, 468 U.S. 517,

---

[6]The alleged violations of the Fourth and Eighth Amendments are applied via the Fourteenth Amendment.

[7]See Carrigan v. Davis, 70 F.Supp.2d 448, 454 (D.Del. 1999) ("[s]exual conduct between prison guards and inmates destabilizes the prison environment by compromising the control and authority of the guard over the inmate, compromising the inmate's health, security and well-being and creating tensions and conflicts among the inmates themselves").

526-27 (1984).

Although the Eighth Amendment's prohibition against cruel and unusual punishment necessarily excludes from constitutional recognition de minimis uses of force, See Norman v. Taylor, 25 F.3d 1259, 1263 (4th Cir. 1994), when an inmate establishes that the alleged sexual abuse was egregious and pervasive a claim under the Eighth Amendment can be made. See e.g. Watson v. Jones, 980 F.2d 1165, 1165-66 (8th Cir. 1992). In fact, an inmate may state an Eighth Amendment constitutional claim under § 1983 for sexual harassment if it was sufficiently harmful[8] and occurred with intent to harm the prisoner. See e.g. Beardsley v. Webb, 30 F.3d 524, 529 (4th Cir. 1994); Pontarelli v.Stone, 930 F.2d 104, 113-14 (1st Cir. 1991); Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989); Bohen v. City of East Chicago, Ind., 799 F.2d 1180, 1187 (7th Cir. 1986).

Two requirements must be met to properly show a violation of the Eighth Amendment. First, the alleged infliction must be sufficiently serious. Second, there exists a mens rea requirement, in that there must be a "culpable state of mind." In this instant case, this manifests itself as the government employee's deliberate indifference to a substantial risk of serious harm to the inmate. See Farmer, 511 U.S. at 834. Courts have repeatedly recognized that because no legitimate law enforcement or penological purpose can be inferred by the sexual abuse by a prison official, the sufficiently culpable state of mind is present to violate the prisoner's constitutional rights. See Jordan v. Gardner et al, 986 F.2d 1521, 1524-31 (9th Cir.

---

[8]Sufficiently harmful is defined as departing from "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86 (1958).

1993), Boddie v. Schnieder, 105 F.3d at 861 (2d Cir. 1997).

In this current case, Smith has alleged actions by Cochran that demonstrate the use of excessive force sufficiently prevalent to demonstrate a pattern which resulted in alleged injuries that are objectively "harmful enough to implicate the Constitution." See Hudson v. McMillian, 503 U.S. 1, 8 (1992), see also Farmer v. Brennan, 511 U.S. 825, 855 (1994), Wilson v. Seiter, 501 U.S. 294, 298 (1991). The Court concludes that these alleged instances of sexual abuse would constitute a "deprivation which amounts to a wanton and unnecessary infliction of pain ...[physical and mental] ... which is so malicious that it violates contemporary standards of decency ...." Women Prisoners v. District of Columbia, 877 F.Supp. 634, 664-65 (D.D.C. 1994), vacated in part on other grounds, 899 F.Supp. 659 (D.D.C. 1995).

Along with recognizing a constitutional violation of Eighth Amendment rights, the court recognizes an additional violation of federal law. 42 U.S.C. § 1983 "authorizes suits against State and local officials based upon federal statutory as well as constitutional rights." 122 Cong. Rec. 35122 (1976) (emphasis added). "A general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." United States v. Lanier, 117 S.Ct. 1219, 1227 (1997) (citation omitted).

This Court may look to available decisional law of the Tenth Circuit to ascertain whether federal law has been violated. In order to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court or its court of appeal. See Lattany v. Four

Unknown U.S. Marshals, 845 F.Supp. 262 (E.D. Penn 1994).[9] Because "government officials are charged with knowledge of constitutional development, including all available decisional law," Guitierrez v. Municipal Court, 838 F.2d 1031, 1048 (9th Cir. 1988), Cochran is responsible for the Tenth Circuit's interpretation of constitutional law as it applies to the liberty interests of inmates.

The Supreme Court has reiterated that "[i]nmates retain those constitutional rights that are not inconsistent with [their] status as prisoners." Pell v. Procunier, 417 U.S. 817, 822 (1974). Following this line of reasoning, the Tenth Circuit held in Hovater v. Robinson, 1 F.3d 1063 (10th Cir. 1993), that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards." Id. at 1068. By interpreting the Constitution through the rubric of Supreme Court precedent, the Tenth Circuit's opinion established a constitutional deprivation in regard to prison guards and inmates. In the current case, Cochran acts as a de-facto guard"[10] and is liable to her for the constitutional deprivation as interpreted by the Tenth Circuit Court of Appeals.

Although Smith argues in her complaint that Cochran violated her rights as protected by the state pursuant to 21

---

[9]The Court notes that in an abnormal case, other courts' decisional law may clearly establish a principle of law, but these "decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting. See Lattany, 845 F.Supp. at 266, see also K.H. v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990).

[10]In its holding concerning the application of qualified immunity, the Court discusses the applicability Cochran's status as a constructive or de-facto guard exists.

O.S. § 111(A)(7), violations of state law do not give rise to a § 1983 claim. See Rom[illegible]v. Board of County of Lake, State of Colo., 60 F.3d 702, 7[illegible] 10th Cir. 1995), Jones v. City and County of Denver, Colo., 854 F.2d 1206, 1209 (10th Cir. 1988), see also Gomez v. Toledo, 446 U.S. 635, 640 (1980). Thus, in regard to her claim that Cochran violated this state statute, such does not independently deprive her of a right "secured by the Constitution and law." 42 U.S.C. § 1983.

"Under Color of State Law"

Thus, the only question which the Court must address with regard to the § 1983 claim at this time is whether Smith properly alleges that defendant was a state actor or acting under color of state law[11] at the time of the alleged assaults. "Under Section 1983, liability attaches only to conduct occurring 'under color of law.' Ergo, the "only proper defendants in a Section 1983 claim are those who 'represent [the state] in some capacity, whether they act in accordance with their authority or misuse it.'" Gallagher, 49 F.3d at 1447 (quoting NCAA v. Tarkanian, 488 U.S. 179, 191 (1988)). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." West, 487 U.S. at 49. The "conduct allegedly causing the deprivation of a federal right' must be 'fairly attributable to the State." Gallagher, 49 F.3d at 1447 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). "In order to establish state

[11]See United States v. Classic, 313 U.S. 299, 326 (1941) ("[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of "state law").

action, a plaintiff must demonstrate that the alleged deprivation of constitutional rights was 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.' In addition, 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" Id.

Accepting Smith's allegations against Cochran as true for the purpose of the motion for summary judgment, the Court finds that Cochran, while serving as a DPS employee, "used the state power as a coercive force to further [his] wrongful acts against" Smith. Gwynn v. Transcor America, Inc., 26 F.Supp.2d 1256, 1265 (D.Co. 1998). Cochran had control of Smith as a DPS employee of the state, pursuant to a contract entered into between DOC and DPS. In fact, Smith has testified that she was not free to leave while working for DPS and could be subject to punishment if she disobeyed the commands of the DPS supervisors. See Smith's deposition.

In order to do a proper evaluation one must examine "the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." Martinez v. Colon, 54 F.3d 980, 986 (1st Cir. 1995). "Acts of officers who undertake to perform their official duties are included whether they hew the line of their authority or overstep it." Id. (quoting Screws v. United States, 325 U.S. 91, 111 (1945)). In this case, the abuse, which allegedly occurred to Smith while working in a janitorial capacity, was perpetrated in the performance of his assigned tasks of his assigned tasks as a license examiner.

As a DPS employee, Cochran had the responsibility to ensure that rules and prohibitions proscribed by the DOC were

adhered to at the DPS facilities by the inmates. Without his cloak of state authority, Cochran could not have performed the alleged sexual assaults." See id., see also Terry v. Adams, 345 U.S. 461, 469-70 (1953) (if a private actor is functioning as the government, he becomes the state for purposes of state action), Gallagher, 49 F.3d at 1456 ("If the state delegates to a private party a function 'traditionally exclusively reserved to the State,' then the private party is necessarily a state actor") (citations omitted).

The Court concludes that Cochran acted under color of state law in sexually abusing inmate Smith, finding that "a 'real nexus' exists between the activity out of which the violation occurred]" Doe, 15 F.3d 452 n.4 and his duties and obligations as a DPS employee. Based on the foregoing facts, Cochran, as a DPS employee, was acting under color of state law when interacting with Smith. Even though he was not acting in his normal professional capacity as a license examiner, he still used his authority, with the required nexus to the state to carry out his plan of coercive sexual rendezvous and violated Smith's civil rights. See West, 487 U.S. at 46. Thus, because Cochran is accused of depriving Smith of her federal constitutional right to bodily integrity and he did it under color of state law, Cochran would be in violation of 42 U.S.C. § 1983.

Qualified Immunity

The doctrine of qualified immunity shields public officials performing discretionary functions from § 1983 liability for civil damages if their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), Prager v. LaFaver, 180 F.3d 1185, 1190 (10th Cir. 1999). "In analyzing qualified immunity claims,

we first ask if a plaintiff has asserted the violation of a constitutional right at all, and then assess whether that right was clearly established at the time of the defendant's actions." Gehl Group v. Koby, 63 F.3d 1528, 1533 (10th Cir. 1995). To demonstrate that the law was clearly established, Smith must show that the alleged unlawfulness of Cochran's conduct was apparent in light of preexisting law."[12] See Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253 1253, 1260 (10th Cir. 1998). "The contours of the right[13] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. Thus, Smith has the burden to establish that "the asserted right's contours are sufficiently clear, and if that burden is met then Cochran "bears the burden, as a movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity." Romero v. Fay, 45 F.3d 1472, 1475 (10th Cir. 1995) (internal quotation omitted).

Cochran's arguments contained in his answer and motion for summary judgment focus on whether consensual sex between an inmate and a non-custodial government employee is a violation of clearly established federal law. Although it is true that "[t]he Tenth Circuit has not previously determined whether a prison guard may raise consent as an affirmative defense to a § 1983 allegation of [excessive force], nor is the

---

[12]See Currier v. Doran, 242 F.3d 905 (10th Cir 2001) (holding that clearly established law is construed as Supreme Court or Tenth Circuit decisions on point or the clearly established weight of authority from other courts).

[13]See Wilson v. Meeks, 52 F.3d 1547, 1552 (10th Cir. 1995) (holding that the question of qualified immunity dovetails with the substantia inquiry in a § 1983 action in that both depend on the specific contours of the constitutional right at issue).

law clearly established elsewhere" Giron v. Corrections Corporation of America, 191 F.3d 1281, 1287 (10th Cir. 1999),[14] this argument is simply not applicable to the case at bar. At no time in Smith's complaint did she claim that the alleged sexual contact was consensual, in fact she claims that the actions were forceful and rose to the level of rape by instrumentation, and otherwise. The Court finds that there are sufficient factual matters alleged to support her claim that she was forcefully sexually battered and raped by instrumentation to sustain her burden at this stage.

Whether non-consensual sex in this capacity is a violation of clearly established federal law is a question of first impression for this Court. Guided by "contemporary standards of decency," Estelle v. Gamble, 429 U.S. 97 (1976), the [United Sates Supreme] Court has previously addressed the minimal standards necessary to provide humane conditions of confinement, See Helling v. McKinney, 509 U.S. 25 (1993), and prison officials' duties to assure the constitutional rights and proper safety to inmates, See Hudson v. Palmer, 468 U.S. 517 (1984). Acknowledging this standard, the Tenth Circuit has held that a prison official's failure to protect an inmate from a known harm may constitute a constitutional violation. See Hovater, 1 F.3d at 1068. In that same case, the court clearly established federal law that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards." Hovater, 1 F.3d at 1067.

In the case at bar, Cochran served as a government employee in the Department of Public Safety as a license

---

[14]See also Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402, 1406 (5th Cir. 1995) "suffered an actionable deprivation of her liberty interest in freedom from sexual abuse by persons wielding state authority."

examiner.[15] Although he did not hold the position of "prison guard or official," he served in an analogous role with similar duties.[16] While there are superficial differences between Cochran's actions of complying with the DOC regulations regarding inmates and the responsibilities of a guard, the similarities are more instructive than the differences. Standard duties of prison guards encompass care, security, and control of inmates. They are responsible for the implementation of prison policies and must ensure humane conditions of confinement and "take reasonable measures to guarantee the safety of inmates." See Hudson v. Palmer, 468 U.S. 517 (1984). See Helling, 509 U.S. at 31-32, Washington v. Harper, 494 U.S. 210 (1990); Estelle v. Gamble, 429 U.S. 103 (1976). In order to achieve this goal, guards must maintain constant surveillance of the inmate's movements and activities. This phenomenon of "control dichotomy. . . [is nowhere] . . . more pronounced than in the context of the special relationship between prison guards and prisoners." Carrigan v. Davis, 70 F.Supp.2d 448, 458 (D.Del. 1999).

The coercive nature of these duties exert compelling pressures on inmates which undermine their free will. See Fisher v. Goord, 981 F.Supp. 140, 172 (W.D.N.Y. 1997) ("an inmate might feel compelled to perform sexual favors for correction officers in order to be on the officer's "good side" . . . which is . . . quid pro quo behavior [that] is inappropriate,

---

[15]The Court notes that "The [License] Examiner's Bureau may consist of both uniformed members of the Oklahoma Highway Patrol Division and nonuniformed classified employees of the Department of Public Safety both of whom may administer tests for the purpose of issuing driver's licenses . . . ." See 47 O.S. 2-106.

[16]See Websters Dictionary 516 (10th Edit. 1999) defining "guard" as one assigned to protect or oversee another.

despicable and serves no legitimate penological purpose"). An inmate, by definition, relinquishes her liberty and submits herself to the control of guards and other officials in similar roles. Even in regard to a state governmental employee working with an inmate who has dominion over her free will, the same effect is created due to the inmate's inherent vulnerability as a ward of the state fc. which the employee works. In this case, where a public works contract created institutional rules to which all DPS employees were required to adhere, the employees themselves represent state employee surrogate guards who are empowered to control the inmate's existence while the inmate performs labor in their facility. See Prisoners Public Works Project Contract. By reason of their significant engagement in performing the contract between DOC and DPS, these DPS surrogates perform the jobs for which the DOC officers are chartered.

The Court declines to adopt Cochran's argument that he had no supervisory duties, official or unofficial, over Smith during the time in question. See Cochran's deposition, 26-27. It is inherently obvious to the casual observer that in order for Cochran to permit Smith to violate the rules and regulations that Cochran, himself, had been instructed to enforce, he would have had some form of authority, control, supervisory powers over Smith. In fact, Cochran is alleged by Smith of not only allowing forbidden telephone privileges, shopping sprees, and family visits, but also of transporting Smith to stores, and the residence of friends and relatives. If Cochran had no authority over Smith, she could have acted on her own free will without having to be sexually molested in order to violate the regulations promulgated by the Department of Corrections.

Although the precise amount of actual authority, as exercised by Cochran over Smith, is neither admitted nor

present in the record, it is of no crucial relevance. The power possessed by state authority can either be actual or apparent authority.[17] The Tenth Circuit has held that the color of law test is one where the defendant's actual or apparent authority is combined with a "real nexus" between the conduct and his "badge of state authority." David v. City and County of Denver, 101 F.3d 1344, 1353 (10th Cir. 1996), see Jojola v. Chavez, 55 F.3d 488, 492-93 (10th Cir. 1995) (holding that authority with which the § 1983 defendant is clothed may be actual or apparent), see also Lugar, 457 U.S. at 937.

The holding by the Tenth Circuit that "inmates have a constitutional right to be secure in their bodily integrity and free from attack by prison guards," Hovater, 1 F.3d at 1067, was not intended to be a limitation hinging on job title, but rather an affirmation of inherent rights in regard to various government employees who serve as constructive guards when prison officials are temporarily absent. It should be apparent to the parties involved at suit, and any other governmental employee, who has custodial authority over an inmate, taking sexual liberties against their will, that such is a constitutional violation. This "conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous preexisting case law is not required to show that the law is clearly established."[18] Mendoza

[17]See Restatement 2d (Agency) § 219(2)(d) finding that apparent authority exists where a victim's conclusions are reasonable as to the ostensible superior's authority over him or her).

[18]See also Fisher v. Goord, 981 F.Supp. 140 (W.D.N.Y. 1997) ("there can be no doubt that severe or repetitive sexual abuse of an inmate by a prison official can be objectively [and] sufficiently serious enough to constitute an Eighth Amendment violation.").

v. Block, 27 F.3d 1357 (9th Cir. 1994) (quoting Casteel v. Piescheck, 3 F.3d 1050, 1053 (7th Cir. 1993). Therefore, regardless how closely Hovater parallels the instant case, the previously held law by the Tenth Circuit should have put all government employees with authority over an inmate on notice as to what would constitute a constitutional violation regarding bodily integrity of an inmate.

Thus, the Court holds that inmates have just as much of a constitutional right to be secure in their bodily integrity and free from attack by government employees with de minimis control over inmates, as they do from state employed prison guards, primarily because of the inherent status of the inmates, themselves, as vulnerable wards of the state. Thus, Cochran is not entitled to summary judgment on his qualified immunity defense because Smith has alleged facts sufficient to show that Cochran violated clearly established federal law such that a reasonable government employee should have known[19] of the constitutional right of which he was depriving the plaintiff.

Intentional Infliction of Emotional Distress Claim

Finally, as to her intentional infliction of emotional distress claim,[20] the Court finds, as a matter of law, that Cochran's conduct rises to the level of extreme and outrageous

---

[19]The Court notes that in this case Cochran admits that he knew it was a crime to have sex with an inmate. See Cochran's deposition, 97, Cochran's Response to Plaintiff's Request for Admissions No. 7.

[20]See Zeran v. Diamond Broadcasting Inc., 19 F.Supp.2d 1249, 1253 (W.D. Okla. 1997) quoting Eddy, 715 P.2d at 76-77 ("[o]nly when it is found that reasonable men could differ in an assessment of this critical issue may the tort-of-outrage claim be submitted to a jury").

conduct under Eddy v. Brown, 715 P.2d 74 (Okla. 1986). Cochran's alleged activity of demanding sexual relations with Smith in order for her to be granted extra privileges was so egregious and outrageous that it goes beyond the bounds of common decency and is utterly intolerable. See Brock v. Thompson, 948 P.2d 279 (Okla. 1997); See Breeden v. League Services Corp., 575 P.2d 1374, 1378 (Okla. 1978). Smith has alleged conduct and actions by Cochran so unjustifiable and so senselessly destructive of her that it rises to the level of outrageous conduct, as that term describes the cause of action for intentional infliction of emotional distress.

In order to establish a *prima facie case* of intentional infliction of emotional distress, a plaintiff is required to show that a *tortfeasor* acted intentionally or recklessly, his conduct was extreme and outrageous, plaintiff actually experienced the emotional trauma, and that the emotional distress was severe. See Daemi v. Churches' Fried Chicken, Inc., 931 F.2d 1379, 1387 (10th Cir. 1991), Anderson v. Oklahoma Temporary Services, Inc., 925 P.2d 574 (Okla. Ct. App. 1996).

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. See Restatement of Torts (Second) § 46 Comment d. In this case, the jury could find that Cochran's alleged abuse and manipulation of a position of influence, in order to place inmate Smith in a sufficiently vulnerable position so that in order to keep preferential treatment and privileges from being withheld she must submit to carnal knowledge and rape by instrumentation, was extreme enough to rise to the aforementioned level. Here, we are not dealing with "mere insults, indignities, threats, annoyances, petty oppressions, or

other trivialities." See id.

A reasonable jury could find that Cochran's alleged acts are so atrocious and utterly in intolerable, considering the circumstances of Smith's status, that no civilized person could be expected to endure them without suffering mental distress. In fact, Smith alleges that she was not only subject to unwanted sexual intercourse, but also rape by instrumentality using a salt shaker, fellatio, inappropriate sexual touching, and harassing sexual comments. Smith alleges that she suffered physical and emotional trauma from months of sexual torment that required her to seek medical treatment and psychological counseling. See Plaintiff's deposition, 165-76. A reasonable jury could find that these acts of sexual abuse constitute a deprivation which amount to a wanton infliction of emotional pain which is so malicious that it violates contemporary standards of decency. See Jordan v. Gardner, 986 F.2d 1521, 1525-31 (9th Cir. 1993) (en banc) (holding that sexual assault, coercion, and harassment certainly may violate contemporary standards of decency and cause physical and psychological harm); see also Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia, 877 F.Supp. 634, 664-67 (D.D.C. 1994). Thus, the Court finds that Smith's emotional injury was severe.

Although the Tenth Circuit has previously held that "[n]othing short of '[extraordinary transgressions of the bonds of civility' will give rise to liability for intentional infliction of emotional distress, Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1558 (10th Cir. 1995), quoting Merrick v. Northern Natural Gas Co., 911 F.2d 426, 432 (10th Cir. 1990, being forced to perform deviant sexual acts for preferential treatment is the type of conduct for which recovery under the tort theory of intentional infliction of emotional distress was may be allowed. The Court finds that reasonable minds could differ as to whether the facts

of this case rise to the required level sufficient for an actionable cause of action, thus this action is not appropriate for summary judgment. Therefore, the Court denies the motion for summary judgment against the defendant on the tort of outrage.

Conclusion

For all the reasons, heretofore given, the Court denies Cochran's motion for summary judgment concerning the violation of civil rights pursuant to 42 U.S.C. § 1983, the application of qualified immunity, and the cause of action concerning intentional infliction of emotional distress.

IT IS THEREFORE ORDERED that the motion for summary judgment filed by the defendant is hereby DENIED.

IT IS SO ORDERED this 7th day of May, 2001.

"s/ H. Dale Cook "
H. DALE COOK
Senior U.S. District Judge

Appendix E

OFFER OF PROOF

1. Affidavit of Don Roush
2. Story in Daily Oklahoman Newspaper
3. Trial Transcripts

AFFIDAVIT

1. This is Lt. Larry Rutherford of the Internal Affairs and Special Investigations Section with the Department of Public Safety. Today's date is May 24, 1979. The time is approximately 3:43 p.m. I'm present in the Internal Affairs office, Oklahoma City, Oklahoma, County of Oklahoma. Present with me is Supervisor Don Roush #121. Supervisor Roush, are you aware that our conversation is being recorded and will be reduced to a typed sworn affidavit form at a later date for your signature?

   A. Yes I am.

2. Q: Lieutenant, the reason for our visit today concerns a former employee of the Department of Public Safety, one Venus Jenkins, formally a security guard at the Training Center. If you would, could you tell me what led up to the termination of Mr. Jenkins' employment with the Department?

   A. Well, Larry, on most of it, it was lack of professionalism in his duties. And he would not comply with the rules and regulations of the Center that are set our for security guards. Plus a lot of it, a lot of the other dealt with his improper courtesy to other officers and personnel that were in the Center there, you know, after hours and soforth.

3. Q: Did you have knowledge or do you have knowledge now of any other activities of Mr. Jenkins that would have also been used in relation to his dismissal?

A. Yes. I had other activities that Mr. Jenkins — supposedly it was so called hearsay at the time and this also — I kept this in mind when I terminated him.

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____,

4. Q: There have been allegations made by Mr. Jenkins of some illicit sexual activity by another security guard in the Training Center. Are you aware of those allegations?

A. Yes, by the newspaper plus there was some talk in the Center of it.

5. Q: When Mr. Jenkins was terminated from the Department, Captain Elam had a visit with Jenkins. And Jenkins made these allegations known to Captain Elam. Did Captain Elam give you any instructions as far as to conduct an investigation into those allegations?

A: Yes, he did.

1. Q: Don, do you remember when these instructions were given to you?

A. Not the exact date. I could dig back into my records and probably come up with a definite date on it, no time.

2. Q: Jenkins was dismissed from the Department on February 15, 1979.

A: Yes.

3. Q: How long after that did you find out about these allegations?

A: Well, I was partly aware of them prior to that. This was one reason on my decision of his work

performance and duties and soforth and some of the talk that was going around the Center is one reason I decided to go ahead and terminate him since he still fell underneath his six month probation period.

4. Q: To go back just a second, you said that you were aware of the sexual allegations prior to his dismissal.

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____,

A: No, not the sexual allegations. It was some other items.

5. Q: But you were not aware prior to his dismissal of the allegations that he made that there was some illicit sexual activities in the Center?

A: Not by him, no.

6. Q: Were there any statements made by anybody else?

A: Oh, rumorwise from a few of the convict residents at the Center.

7. Q: In those rumors that you talk about, was there any name ever mentioned?

A: Well, yes, a couple of names. But after the conversation with the Captain and myself and after I dug into a little bit, it was still just hearsay. I never could get any proof.

8. Q: After the Captain talked to Jenkins, did the Captain assign you to investigate these allegations?

A: Yes.

9. Q: What type of investigation did you conduct, Don? Can you tell us what you did as far as determining if the allegations were true or false?

A: Well, I visited with the convict residents over

there and got information from them. That was just about the sum of it. I gave my report to the Captain.

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____,

Q: And your report to the Captain was a verbal report; it was not a written report.

A: Yes.

Q: What did your total investigation lead you to believe?

A: Well, like I discussed with you earlier, I couldn't find any definite proof on it other than just hearsay talkwise.

Q: In other words, in your contact with the trustees, the residents there, you could find no information to substantiate the allegations; is that right?

A: Well none that I could give a statement from.

Q: Did anyone of the trustees or the residents there state to you that this type of activity was occurring?

A: They stated to me that they thought it was going on, yes. I had one that made the statement to me.

Q: Who was that?

A: Sam Kericoe (SIC) who is no longer at the Training Center. He paroled out; he was dressed out.

Q: During your investigation of the sexual activities, the only people that you contacted were residents there?

A: Yes.

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____,

Q: Did you contact any other people other than residents, did you contact Dorothy Inman?

A: No.

Q: Did you contact any other security guard to gather any information?

A: No.

Q: Did Jenkins ever to you personally impart any of this information?

A: No, not to me.

Q: In your report to Captain Elam when you finished your investigation and reported to Captain Elam, what did you reflect to him?

A: Just exactly what I got through stating to you there, that I had one resident over there that said he thought this was going on but he didn't really know for sure. And then there was a couple of other names—there was a couple of names I should say dropped as possible people that might be involved in it.

Q: What were those names, Don?

A: Well, the first one was Don Porter. And I got to doing some checking around on it and come to find out it wasn't really Porter. They were just hoorahing Porter about it, primarily thought Doug Poplin who was a resident that I had over there. Supposedly from this one resident's statement prior to this indicated Poplin. So

after I got to that, eliminated Porter on it, it all boiled down to Poplin.

Q It is actually Poplin that it is assumed that the activity occurred with?

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____.

A: Well, all indications led towards him, yes, than it did to Porter. Like I say, as far as trying to get any firm statement on it with a signature or notorized or anything like that, no, I was not able to obtain any of that.

Q: Don, do you believe that this activity was occurring from your investigation?

A No, I really don't. I couldn't ---- I really couldn't dig up enough to say that it really was going on.

Q: Let's go back to Jenkins' activities in the Training Center. I have information from you that I got earlier this afternoon that Jenkins was possibly showing some type of pornographic films to the residents over there. As far as you're concerned, this was occurring?

A: Yes. This was very strong over there when I went over into the Training Center which was about in December. After I had been there a week I kept getting a little rumble on it here and there. When I talk about rumble, over here some of them speaking of it. This and that and kind of making remarks at the table if we'd be having coffee or something, visiting with them a little bit. And I kept digging into it and digging into it and I finally found out for sure that they were doing it. I was not able to catch them at it. I tried but it was either too early or we'd tip them off or we'd come in right after they were showing them.

Q: Did you ever recover any contraband that would indicate that this type of activity was going on?

A: Well, I confiscated some contraband but I can't say that

it was being used in this. But it was pornographic material, yes.

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____.

Q: Don, do you have anything else that you would like to add to this statement that you think might be pertinent to the allegations that were made in reference to the Training Center?

A: Well, about the only thing I would want to say on it, Lieutenant, would be from what I was able to come up with over there, I don't think there were any activities like sexual activities going on other than the showing of the pornographic material and a few magazines and this and that, you know. In my rules and regulations over there, this is prohibited—to have this material over there.

Q: Don, I'd like to go back to some dates to clarify some times here. The letter that you wrote to Captain Elam is dated February 13, 1979. And this was to inform the Captain that you were desiring to terminate this officer effective February 15, 1979. That's the date of his effective termination, last employed date, right?

A: The 15th, yes.

Q: Keeping in mind that this occurred on February 15, 1979, do you know when Jenkins came to the Captain to make the allegations?

A: Exact date?

Q: No, not exact date. Say a week after or two weeks after or when it was that he made those allegations?

A: It was either the 12th or the 13th I believe, somewhere in around there. It as in that week.

Q: The 12th or the 13th of February?

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____,

A: Yes.

Q: Then when from that time when the Captain knew or from when the allegations were made, when did he assign you to investigate that?

A: The same date that Jenkins was up there.

Q: So that would have been around the 12th or 13th that you were aware of it?

A: Somewhere in there.

Q: That he was making the allegations of this sexual misconduct?

A: Yes. The Captain called me up there and discussed it with me. I told him what information I had and also to go along with my decision with his concurrence to terminate. And this is when he told me to dig into it and find out if there was anything that we could actually pin it right down—if there was anything going on. And as I stated a while ago, I was unable to find anything that I could pin it right down and say yes they were or were not.

Q: How long after you were given this assignment was it before you made your final report to him?

A: The last part of the next week.

Q: So you took about a week to check with all of the residents and everybody that you were checking with on it?

A: Yes, because you have to kind of handle that pretty delicately on something like that. And plus I was trying to do it very discretely.

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____.

Q: Since the completion of your investigation, have you been able to uncover any other information that might be pertinent to this activity?

A: No. All information I have dug up was dug up when I was doing all my investigation, trying to find out what was going on. As of this date today was the date I went ahead and had the residents that wished to make a statement on it, make their statements, which was done today.

This is kind of a touchy situation when there are accusations made there and I was unable to really dig up anything that I could really put my finger on. And this was all my information that I was related to the Captain.

Q: Did you ever make any reports to anyone other than the Captain on it?

A: Not other than you.

Q: Do you have anything else that you would like to add that you think might be of interest?

A: No, not at this date. Later on if you want some information that I might have, I will be more than glad to make a statement on it. But as of right now I don't have anything else other than what I've already told you and furnished you with information on it. There probably will be at a later date but not right now.

Q: Okay, this will conclude our interview with Lt. Don Roush. The time is 3:59 p.m.

-CONCLUSION-

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____,

I, Don Roush, of lawful age, being first duly sworn depose and say that I have read the above and foregoing questions and answers consisting of 7 pages and placed my initials upon each page, and know the contents thereof to be true and correct to the best of my knowledge.

"s/ Don B. Roush #121 "
(Signed)

Subscribed and sworn to before me this _____ day of _____,

Patrol Officer Demoted in Harassment Case

By Kim Stottb

A second lieutenant with the Oklahoma Highway Patrol has been demoted to the rank of trooper and transferred to field duty after two female inmates complained that he sexually harassed them, authorities confirmed.

Chief Jerry Biggers demoted Don Roush on Friday after the state Attorney general's office asked the patrol to investigate the complaints, patrol spokesman Lt. Pat Collins said Tuesday.

Judy Holbird and Cathy Trettor, both inmates at the Clara Waters Community Treatment Center in Oklahoma City, worked under Roush at the patrol's training center. Both women lost their jobs Nov. 18.

Miss Holbird said Roush tried on several occasions to grab her, but she said she resisted. He also "talked vulgar" to Miss Trettor, she said.

"We both had a problem with him and it was both sexual-harassment type," Miss Holbird said.

Neither Collins nor Mike LaPuzza, the patrol's director of training and Roush's supervisor, knew any specifics of the inmates' allegations.

"We cleaned our house when we received our information," Collins said.

Roush was on vacation and could not be reached for

comment.

The inmates complained to the American Civil Liberties Union in a letter written on Oct. 6. Miss Holbird said she did not notify patrol authorities because "it wouldn't have done any good."

About a month later, the Department of Public Safety and the Department of Corrections conducted a joint investigation into the inmates' complaints.

Miss Holbird said internal affairs officers from both agencies questioned her and that corrections personnel gave her a polygraph test on Nov. 8. She said the test indicated she was telling the truth.

Miss Holbird and Miss Trettor were among about 25 inmates who work at the training center. The jobs are prized because inmates earn three days of credit for each day on the job, Miss Holbird said.

LaPuzza said Miss Holbird and Miss Trettor were "reassigned administratively" by the Corrections Department.

Miss Holbird said other women claimed to have been harassed at the training center, but were afraid to speak up.

She said she chose to speak out because "self-respect is the most important thing. Just because I'm a female and I'm a convict doesn't mean I don't have morals," she said. "I respect the law, but not every law-enforcement officer."

REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD OF JANUARY 7, 2004

JURY TRIAL

VOLUME II

MS. SMITH'S TESTIMONY

MS. BRIDGER-RILEY and **MR. CAMP** are Petitioner-Plaintiff's Attorneys
MS. BERGLAN and **MS. TODD WORK** for the State Attorney/General's Office, Attorneys for Respondent-Defendant

TRIAL TRANSCRIPT, PP. 234:

Line 13:

Q: "Now you talked about the fact that there were two locations that you worked, the north side location and the Jenks location; is that correct?"

A. Yes, ma'am.

Q: And in fact you hated working at the Jenks location; isn't that correct?

A: I didn't say I hated it. I didn't like it. I wasn't among people that –I was around a lot of, you know, people that I didn't know or something. I just preferred the north side.

Q: But you didn't hate Jenks then?

A: I don't think I hated Jenks. I'd just rather be on the north side.

PP. 235:

Q: Well, I mean you'd know whether you hated Jenks or not.

A: I don't like the word hate. I didn't like.

Q: Okay. Let me ask you to turn to page 41 of your deposition, please. We're going to begin reading at line 5, and let me known when you're there.

A: Yes, ma'am I'm there.

Q: "Question: Then he would make the determination as to which location you would go to or what you would do that day?

A: Pretty much. He would kind of like let us decide, but he would pretty much make that decision."

Q: I'm going to skip down to line 14:

"Just to tell it like it is, most of the white girls didn't want to work on the north side so they had to do a racial balance thing. They tried to keep a black and a white. And the white girls liked to go to Jenks, and the black girls like to go north. I hated Jenks like she hated the north side."

Did I read that correctly?

A: Yes, I guess I said that. It's in there.

Q: Now, with regard to the freedoms that you had at the north side, having visitors, using the phone, leaving the premises, is it your allegation that Don Cochran is the only one who gave you those freedoms?

A: Yes, ma'am, Don Cochran was the only person that gave me freedoms like that.

EDGAR SPENCER'S TESTIMONY

P. 302, Line 6:

Q: Was there anything that you did–well, let me ask you this. Were you the person that inmates were supposed to report misconduct to if it occurred?

A: Yes sir.

Q: What did you do to ensure that inmates knew that you were the person to speak with?

A: As I stated before, when they were assigned I would sit down with them, we'd go over the rules they were expected to follow.

Q: And so at the time you told them they were to come to you if they had a problem?

A: Yes sir.

Q: Sir, was there ever a situation where you would bypass this initial investigation that you would typically conduct and report on up to the next level?

A: A serious enough allegation, yes, sir, if I determinated it was a serious violation. We are a paramilitary organization, we are required to follow a strict chain of command.

Q: Give us some examples of what you would consider a serious violation.

PP. 303:

A: Threats against an employee.

Q: I'm sorry?

A: Threats against another employee. Anything sexual.

Q: Threats against another employee and anything sexual?

A: That could cover a variety of subjects. Any violation of the rules would be a violation.

Q: I'm talking about these major incidents that you would report on up; immediately.

A: Improper conduct.

Q: So basically, do you have the discretion to consider whether or not a violation is serious enough to report up

to the next level?

A: Yes.

Q: Sir, do you recall an incident in which Ms. Smith reported to you that Don Cochran had given her a condom?

A: Yes Sir.

Q: What exactly did Ms. Smith report to you?

A: That he had walked up to her and dropped a condom in her hand.

Q: Where were you when Ms. Smith reported this to you, sir?

A: I believe we were on our way back to TCCC.

Q: Did Ms. Smith report to you that the incident had occurred that day?

A: I don't recall if it was that day or the previous day.

Q: But it was within fairly recent proximity to when she told you? (304)

A: Yes sir.

Q: What was your reaction, sir, when Ms. Smith told you about the incident?

A: Unbelief.

Q: You didn't believe her, or you just couldn't believe the situation?

A: I couldn't believe anyone would do that.

Q: Do what, walk up to a female and drop a condom in their hand?

A: Yes, sir.

Q: Sir, based on your conversation with Ms. Smith, did you get the impression that this was something that Mr. Cochran had done intentionally or as opposed to, say picking it up off the floor and handing it to her as a piece of trash or something like that?

A: My though was if it happened, it may have been a joke between Mr. Cochran and Pam.

Q: Sir, is that the kind of joke that you tolerate in your facility?

(304 continued)

A: No, sir.

Q: You don't tolerate any kind of dirty joke in your workplace at all; is that correct?

A: That is correct.

Q: In fact, if one is given in your presence don't you make it a point to tell your subordinates that you don't tolerate that kind of behavior? (pp. 305)

A: That's correct.

Q: You've put out several memos to that effect?

A: That's correct.

MS. BRIDGER-RILEY and **MR. CAMP** are Petitioner-Plaintiff's Attorneys
MS. BERGLAN and **MS. TODD WORK** for the State Attorney/General's Office, Attorneys for Respondent-Defendant

MS. SMITH'S TESTIMONY

P. 182, beginning at Line 5:

Q: In the portion that we just read aloud, that I just read to you on page 117, in that portion in your deposition testimony did you talk about having intercourse with Mr. Cochran?

MS. BRIDGER-RILEY: I'm going to object, Your Honor. This is not proper impeachment.

THE COURT: Overruled. She may ask that question.

Q: (By MS. BERGLAN): In the portion of the testimony that we've read here today together did you talk about having intercourse with Mr. Cochran?

A: Yes, ma'am, I believe I talked about having sex with him.

Q: In the part that you and I read together just briefly?

THE COURT: Well, now, I've got to see you again up here now.

Line 22: THE COURT: You're now narrowing it down

to a particular statement or a page in the deposition.

MS. BERGLAN: Can I just ask her to show me where that is?

THE COURT: The question is did she testify there was intercourse in, I think December of '97.

MS. BERGLAN: Yes.

THE COURT: And you asked in the deposition, she's going to say yes. You're going to say did you ever testify you had intercourse in December or November of '97.

MS. BRIDGER-RILEY: She asked and she said yes, she did testify to that.

THE COURT: And she said yes, she did. And now, you're trying–you're telling me that nowhere in there she did.

MS. BRIDGER-RILEY: That's not right.

THE COURT: I don't know what it is. That's what your question is when you say did you testify on this page about it. Then I can't help you because she may have (pp. 184) testified about it on some other page, and it's a misleading statement. Do you follow me?

MS. BERGLAN: Yes. I guess what I'm not catching is how to get to the part where I can impeach her, because I can't go through every page of the deposition.

MS. BRIDGER-RILEY: She should have asked the question –

THE COURT: The way you get to it is simply say: Here's this deposition. Show me where you said it.

MS. BRIDGER-RILEY: Judge, in the middle of a trial she's going to do that?

THE COURT: If she's going to answer it that way.

MS. BRIDGER-RILEY: Well, I thought, for completion I want to make the record that it is in here.

THE COURT: That's fine. Tell her where it is.

MS. BRIDGER-RILEY: You're saying she can hand her the deposition and say find it, in the middle of a trial?

THE COURT: Why don't you let her ask the question the way she's asking it, then you can show it when you get up.

MS. BRIDGER-RILEY: Okay. It's my understanding if she didn't ask it at trial and it's not in there, then she can't impeach with something that's not in there. That's why my objection was it's improper use of deposition testimony. If she can ask it and it's an opposite answer –

THE COURT: Are you trying to tell me that if somebody doesn't say it, that you cannot bring that out? (pp. 185)

MS. BERGLAN: You can impeach by omission.

MS. BRIDGER-RILEY: She did say it, and she said she said it, and now you're saying it's proper use of a deposition to hand it to her and say find me where you said it?

THE COURT: You've got to show her where it is.

MS. BRIDGER-RILEY: I've just never heard of impeaching in that manner by a deposition.

MS. BERGLAN: You've never heard of impeachment by omission?

THE COURT: All you've got to do is say, Judge, will you look at page X, if it's in there. I don't know if it's in there. I've never seen her deposition.

MR. CAMP: Can you show us in the deposition where counsel asked you if you had vaginal sex in December rather than oral sex. Is that the way she asks the question?

THE COURT: All she does is ask the witness to look at a certain page.

MS. BRIDGER-RILEY: If they didn't ask the specific question: Did you ever have vaginal sex with him in December of 1997, which she did not, okay. She did not.

MS. BERGLAN: Do my notes say it? I'm sorry.

MS. BRIDGER-RILEY: That cite that you read to her

was not a limited cite. It was on a number of things, okay, and I just–she's trying to impeach when she didn't ask the (pp. 186) right question in deposition, Judge, and I just don't think you can do that.

THE COURT: Now, just a minute.

MS. BERGLAN: Oh, come on.

THE COURT: Now she's telling me it's not in there, you're telling me it is in there. You're trying to say because you say it's in there she's denied the right to ask further questions.

MS. BRIDGER-RILEY: No, Judge. The question that she read back was not the same-

THE COURT: She's not on that question. She's not even asking about that question.

MS. BRIDGER-RILEY: Okay. Then I'll stop.

MS. BERGLAN: If it's in there, she can talk about it. I don't know where it's at.

MS. BRIDGER-RILEY: She talks about it, it went on and on several times. We can go ahead.

THE COURT: Just a minute now. The question was: Did you testify about the sex in December or November of '97? She said yes. She was telling me it's not in the deposition.

MS. BRIDGER-RILEY: And she–she was never asked

that question in the deposition, Judge.

(P. 187)

MS. BERGLAN: Yes, she was.

MS. BRIDGER-RILEY: Okay. That's what I can see, because that question–

MS. BERGLAN: Oh. In this deposition? She was asked about all her sexual allegations. Now come on.

MS. BRIDGER-RILEY: Of course she as. But she wasn't asked the limited question did you ever –

MS. BERGLAN: I don't have to be –

THE COURT: Your objection is the question was never asked, therefore it would not be in the deposition. And then I would say if it was never asked, it's an improper question.

MS. BRIDGER-RILEY: Okay. That's where we need to be.

THE COURT: Because the witness is not going to respond to something that was never asked.

MS. BRIDGER-RILEY: Thank you, Judge.

MS. BERGLAN: But she was asked about all the–

THE COURT: Just a minute.

MS. BERGLAN: I'm sorry, Your Honor.

THE COURT: You're going to say yes, that it was asked, it should have been responded to appropriately. You'll have to show me where.

MS. BERGLAN: Okay. Can we do that now?

THE COURT: That's what the situation is you two are trying to explain to me, yes

(P. 118)

MS. BRIDGER-RILEY: Yes.

THE COURT: Now, you show me where she made the statement that is contrary to the statement she has testified to.

MS. BRIDGER-RILEY: Where she was asked the question.

MS. BERGLAN: Okay. The person who did the deposition did not say did you ever have sex in December, but she said is that all the sex? Tell me about all the sexual allegations, and that's what I asked –

MS. BRIDGER-RILEY: And the rest of the deposition goes on about –

THE COURT: You're asking about November and December, not August

MS. BERGLAN: No, all right. But she was asked

about all the sexual allegations in total and she left out –

THE COURT: Ms. Berglan, your specific question was: Did you testify about the sex in December or November of '97. I'm being told that question was never asked.

MS. BERGLAN: Well –

THE COURT: And you're trying to tell me there is a contrary statement in the deposition. Now, all you've got to do is show me where the contrary statement is.

MS. BERGLAN: There's an omission –

MS. BRIDGER-RILEY: This is the question that she read, Judge, and that was –

(P. 189)

THE COURT: I'm not on that question. We went through that a while ago.

MS. BRIDGER-RILEY: Okay.

THE COURT: But if she is saying that's the question that shows the impeachment, then I'll look at it. Now, you show me what you think is impeachment. A minute ago you said she didn't testify. I assume the question was asked or a question was asked that would rationally and reasonably elicit an answer for that testimony.

MS. BERGLAN: Okay. The question I think would rationally and reasonably answer that was she was asked all the sexual conduct that took place between Mr.

Cochran and herself, all of it. She left out intercourse in December. I mean clearly that's an answer to that question.

THE COURT: Show me where it is.

MS. BERGLAN: Okay.

THE COURT: Show me what you're relying upon.

MS. BERGLAN: Okay. Unfortunately, as Ms. Bridger-Riley said, I didn't do these depositions so that's not the way I would ask it.

THE COURT: Well, you're stuck with it.

MS. BERGLAN: I understand. In other words, that's why I'm saying I will have to point you to several different places. It's rambling. Beginning –

THE COURT: Now, tell Ms. Bridger-Riley what you're (p. 190) looking at.

MS. BERGLAN: Do you have Ms. Smith's copy?

MS. BRIDGER-RILEY: No.

MS. BERGLAN: Can you get her copy back so we can show the Judge? Okay. Beginning on page – okay. Beginning on page 112, line 20, that addresses November.

MS. BRIDGER-RILEY: Wait a minute.

MS. BERGLAN: Let me get there. I apologize. I'm not – okay. Then it goes to 116, line 25, she says did you have sex then for the first time, and that's still addressing the November allegation.

THE COURT: Now where?

MS. BRIDGER-RILEY: There's no way to impeach with this.

MS. BERGLAN: I think there is, but –

MS. BRIDGER-RILEY: Well –

MS. BERGLAN: Okay. She goes through a whole chronology of what occurred and that's what this questioning is. I believe there's a place –

THE COURT: She testified she had sex with him in November.

MS. BERGLAN: Right. And in December oral sex but not intercourse.

THE COURT: Pardon?

MS. BRIDGER-RILEY: May I just point –

(P. 191)

MS. BERGLAN: There's a place where she says is that all? Is that everything that happened? And she says yes. But there's – where – do you have that place?

MS. BRIDGER-RILEY: No.

THE COURT: Your question was December or November. She said yes. She said yes in the deposition. The objection is sustained.

MS. BRIDGER-RILEY: Thank you. Could we clarify for the jury that my client is not – or would you at least announce your decision on the objection, Judge?

THE COURT: I don't even know what the objection is. What are you talking about?

MS. BRIDGER-RILEY: The objection was it was improper impeachment. I think the jury has been under the impression that she was –

THE COURT: It wasn't impeachment.

MS. BRIDGER-RILEY: I know that's what I – can you just announce to the jury that you sustained the objection, because she had not been asked that question.

THE COURT: Your objection was to the question.

MS. BRIDGER-RILEY: Yes. That's what I'm saying.

SMITH CASE IS ABOUT JUSTICE NOT A CON

There has been much to do about nothing with regard to testimony from Mr. Green about Ms. Smith's conversation with him about her ability to con an elderly women in a wheelchair. Judge Cook in his order of July 15, 2004, denying Plaintiff a new trial, said, on page 8, "The Motion in Limine entered by the Court dealt with what Plaintiff had been convicted of doing, not what she had claimed she could do." Mr. Green is not being truthful in his testimony of what he alleges Smith told him about conning someone. Ms. Smith never bragged about being a con woman, on the contrary, she was responding to Mr. Green's question and he put his personal spin on that conversation for the purpose of helping Mr. Cochran. After all, he was a fellow employee and Smith was just a convict.

The conversation he is referring to was a question he asked Smith about why she was in prison? She responded by saying what she had done to get in prison, not what she claimed she could to, or would do at this time. The defendant tried to make it look like she was still conning or she was planning a con. Conning people was now in her past and her reference to this issue was past tense. (See trial transcript pp 646-48) Ms. Berglan questioning Mr. Green at trial asked him, MS. BERGLAN: Did she talk to you about her ability to scam elderly people out of checks? MR. GREEN: Uh-huh. She said you can take some checks from the bottom of their checkbook and they won't know it's missing for awhile. MS. BERGLAN: When Ms. Smith was relating this conduct to you did she seem regretful? MR. GREEN: No. MS. BERGLAN: What was her demeanor? MR. GREEN: Just regular conversation. MS. BERGLAN: Nothing further.

MS. BRIDGER-RILEY: Hi, Mr. Green. I'm Kay Bridger-

Riley I don't think we've met before. MR. GREEN: No ma'am. MS. BRIDGER-RILEY: When she was telling you these things, was she talking about the things that got her in trouble and why she went to prison? MR. GREEN: Yes. MS. BRIDGER-RILEY: And she was talking to you about how she used to be; isn't that true? MS. BERGLAN: Objection. THE COURT: Restate the question. MS. BRIDGER-RILEY: I said she was visiting with him about how she used to be, the things she used to do. Isn't that true? MS. BERGLAN: Objection, Your Honor. THE COURT: Overruled. MS. BRIDGER-RILEY: Go ahead and answer. MR. GREEN: Yes, she was talking in past tense. (Pp 648 lines 24-25) MS. BRIDGER-RILEY: You said that she was kind of - - acted like she was kind of proud. Or she asked you, did she act like she was proud of those abilities? MR. GREEN: I think I asked her - - MS. BERGLAN: Objection, Your Honor, I didn't ask that question. THE COURT: Overruled. MS. BRIDGER-RILEY: Go ahead. MR. GREEN: I think I asked her how she got in trouble, how that began.

So you see once again the Court has gotten it wrong and the theory of the case is incorrect. She never talked about what she could then as previously do with regard to stealing checks or credit cards or that she would ever again participate in such activity, but what she had done to get in trouble. Defense testimony was to try to make it appear, that Smith, was bragging about being a con woman, which is not the case. What she did in the past to get in prison has nothing to do whatsoever to do with being raped. In fact, she was paying her debt to society and moving in the direction of being a useful and productive citizen of these United States. She made mistakes; and now this part of her life was behind her to remain there forever. If this was such a great con, why did the investigator think it necessary to hid the glass salt shaker?

This goes directly to how slanted this trial was and how the truth was misused to harm Smith's chances to prevail. Everything about this trial was designed to help the Respondent-defendant. This is just another attempt in many to hide the real truth about this trial, and that is, Smith was raped by Cochran and The State of Oklahoma is trying it's best to cover up the truth which is what they do when they get caught with their pants down.

Appendix F

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF OKLAHOMA

PAMELA SMITH,	)	
	)	
Plaintiff,	)	
	)	Case No. 00-CV-35C
vs.	)	
	)	FILED
DON COCHRAN,	)	
	)	Jan 13 2004
Defendant.	)	

Phil Lombardi, Clerk
U.S. DISTRICT COURT

INSTRUCTIONS

TO THE

JURY

INDEX

OPENING - PROVINCE OF THE COURT 1
CONSIDER WHOLE INSTRUCTIONS 2
BURDEN OF PROOF 3
PREPONDERANCE OF THE EVIDENCE - DEFINED . 4
CLAIMS AND DEFENSES 5
CLAIMS AND DEFENSES NOT PROOF 7
FIRST CLAIM - 42 U.S.C. §1983 8
ESSENTIAL ELEMENTS - 42 U.S.C. §1983 9
UNDER COLOR OF STATE LAW - DEFINED 10
STATE OFFICIAL ACTING UNDER COLOR OF STATE LAW 11
PROXIMATE CAUSE - GENERALLY 12
STATE OF MIND 14
INTENT 15
CUSTODIAL CONFINEMENT 16
REQUIREMENT OF CUSTODIAL CAPACITY 17
PROOF OF STATE LAW VIOLATION 18
SECOND CLAIM - SEXUAL ASSAULT AND BATTERY 19
APPREHENSION DEFINED 20
INTENT 21
THIRD CLAIM - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS 22
INTENTIONAL AND RECKLESS DISREGARD - DEFINED 23
EVIDENCE - DIRECT OR CIRCUMSTANTIAL 24
IMPEACHMENT - INCONSISTENT 25
EXPERT WITNESS 26
DAMAGES - ACTUAL 27
NOMINAL DAMAGES - 42 U.S.C. §1983 28
EXEMPLARY OR PUNITIVE DAMAGES 29
EFFECT OF INSTRUCTIONS AS TO DAMAGES 31
ADVICE CONCERNING NUMBERED VERDICT FORMS 32

VERDICT FORM NO. 1 33
VERDICT FORM NO. 2 34
VERDICT FORM NO. 3 35
VERDICT FORM NO. 5 36
ARGUMENTS AND STATEMENTS OF COUNSEL
ARE NOT EVIDENCE 37
CONCLUDING INSTRUCTION 38
CLOSING 39

OPENING – PROVINCE OF THE COURT

Ladies and gentlemen of the Jury, it is now time for the Court to advise you as to the law to apply in this case; and I ask that you pay close attention – as you have during the trial – because you must consider all of these instructions in your deliberations.

You have heard the evidence and the arguments, and the Court now instructs you as to the law governing the case.

Although you as Jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law, so given, to the facts as you find them from the evidence presented to you.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given to you in these instructions from the Court.

CONSIDER WHOLE INSTRUCTIONS

You are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole; and you are to regard each instruction in the light of all the others.

BURDEN OF PROOF

The burden of proof is upon the plaintiff to establish or prove the material allegations of her complaint by a preponderance of the evidence; and if the plaintiff fails to discharge this responsibility, your verdict should be for the defendant.

PREPONDERANCE OF THE EVIDENCE – DEFINED

You are instructed that by a "preponderance of the evidence" is not necessarily meant the greater number of witnesses, but by a "preponderance of the evidence" is meant that evidence which – in the light of all of the evidence, facts and circumstances in proof of the case – is more satisfying and convincing to the minds of the Jurors.

CLAIMS AND DEFENSES

This is a civil action brought by the plaintiff Pamela Smith against defendant Don Cochran, individually, seeking money damages for civil rights violations under Title 42, U.S.C. § 1983. Plaintiff claims an Eighth Amendment violation for alleged excessive force amounting to cruel and unusual punishment. Plaintiff also asserts two state law claims for sexual assault and battery and intentional infliction of emotional distress.

In support of her claims, Plaintiff alleges that while she was an inmate in the custody of the Oklahoma Department of Corrections, housed at the Tulsa County Correctional Center, she was a trustee who was assigned as a janitor to the Oklahoma Department of Public Safety. She alleges that while working for the Oklahoma Department of Public Safety, the defendant, Don Cochran, repeatedly subjected her to unwanted sexual acts between November 1997 and May 1998. Plaintiff claims she was also exposed to comments of a sexual nature and that Cochran forced her to have intercourse with and perform oral sex upon him several times. She alleges that Cochran gave her a condom and suggested that it would be for his later use, and that he raped her with a salt shaker.

Plaintiff seeks damages against the defendant for her alleged physical and emotional injuries in regard to defendant Cochran's alleged cruel and unusual punishment in violation of her civil rights. Furthermore, Plaintiff seeks damages for the alleged physical and emotional injuries caused by the alleged sexual assault and battery and for the alleged intentional infliction of emotional distress.

In response to Plaintiff's allegations, the defendant

denies ever having had a sexual relationship with Smith. Cochran denies all claims regarding the alleged violation of Smith's civil rights and violations of state law. Defendant disputes the plaintiff's facts, in that he denies ever making sexual remarks to Plaintiff, purchasing a condom for Plaintiff, and/or having any form of sexual relationship with Plaintiff.

These are the issues for your consideration.

CLAIMS AND DEFENSES NOT PROOF

The foregoing recitation as to the claims of the plaintiff and the defenses of the defendant is given to you simply to define the issues to be tried between the parties, and such statements do not constitute proof of any fact in issue in this case.

FIRST CLAIM

42 U.S.C. §1983
Eighth Amendment Cruel and Unusual Punishment

As to her first claim, you are instructed that the plaintiff claims damages under Title 42, United States Code, Section 1983, commonly referred to as a civil rights law. This law provides in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state ...subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

Plaintiff bases her §1983 claim on an alleged violation of the Eighth Amendment to the Constitution of the United States which prohibits "cruel and unusual punishment."

Plaintiff claims that the defendant, while acting under color of authority as an employee of the Department of Public Safety, intentionally violated her constitutional right to be free from cruel and unusual punishment. Plaintiff alleges that she was subject to cruel and unusual punishment by defendant's alleged sexual assaults.

ESSENTIAL ELEMENTS

42 U.S.C. §1983

To establish a claim under Section 1983, the plaintiff must prove each of the following elements by a preponderance of the evidence:

First: That the defendant engaged in a sexual relationship, as alleged by the plaintiff, and that the defendant was a person acting under color of state law;

Second: That the defendant acted with a sufficiently culpable state of mind;

Third: That the defendant had custodial authority over the plaintiff; and

Fourth: That the defendant's acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

UNDER COLOR OF STATE LAW – DEFINED

The first element of the plaintiff's claim is that the defendant acted under color of state law. The phrase "under color of state law" is a shorthand reference to the words of section 1983, which includes within its scope action taken under color of any statute, ordinance, regulation, custom or usage, of any state. The term "state" encompasses any political subdivision of a state, such as a county or city, and also any state agencies or a county or city agency.

Action under color of state law means action that is made possible only because the actor is clothed with the authority of the state. Section 1983 forbids action taken under color of state law where the actor misuses power that he possesses by virtue of state law.

An actor may misuse power that he possesses by virtue of state law even if his acts violate state law; what is important is that the defendant was clothed with the authority of state law, and that the defendant's action was made possible by virtue of state law.

STATE OFFICIAL ACTING UNDER COLOR OF STATE LAW

The plaintiff claims that the defendant was acting under color of the law of the State of Oklahoma when the defendant allegedly deprived the plaintiff of her constitutional right to be free from cruel and unusual punishment.

In order for an act to be under color of state law, the act must be of such nature and committed under such circumstances that it would not have occurred except for the fact that the defendant was clothed with the authority of the state – that is to say, the defendant must have purported or pretended to be lawfully exercising his official power while in reality abusing it.

The act of a state official in pursuit of his personal aims that is not accomplished by virtue of his state authority is not action under color of state law merely because the individual happens to be a state employee.

PROXIMATE CAUSE – GENERALLY

The third element which plaintiff must prove is that the defendant's acts were a proximate cause of the injuries sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of the defendant's act or omission. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the conduct of the defendant. If you find that the defendant has proved, by a preponderance of the evidence, that the plaintiff complains about an injury which would have occurred even in the absence of the defendant's conduct, you must find that the defendant did not proximately cause plaintiff's injury.

A proximate cause need not always be the nearest cause either in time of in space. In addition, there must be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

A defendant is not liable if plaintiff's injury was caused

by a new or independent source of an injury which intervenes between the

defendant's act or omission and the plaintiff's injury and which produces a result which was not reasonably foreseeable by the defendant.

STATE OF MIND

To establish a claim under 42 U.S.C. § 1983, the plaintiff must show that the defendant acted intentionally or recklessly. If you find that the acts of the defendant were merely negligent, then, even if you find that the plaintiff was injured as a result of those acts, you must return a verdict for the defendant.

An act is negligent if the defendant was under a duty or obligation, recognized by law, that required him to adhere to a certain standard of conduct to protect others against unreasonable risks, and he breached that duty or obligation.

An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. An act is done reckless if done in conscious disregard of its known probable consequences.

INTENT

Direct proof of intent – a state of mind – is often not possible, and is not necessary; for the same may be and usually is proved by circumstantial evidence. If you find that a given act was done by the defendant, the intent with which he acted is to be determined by you from all the facts and circumstances as shown by the evidence in this case.

It is not necessary to find that the defendant had any specific intent to deprive the plaintiff of her civil rights in order to find in favor of the plaintiff. It is sufficient if the defendant intended the actions which resulted in a violation of the plaintiff's rights.

CUSTODIAL CONFINEMENT

You are instructed that the term "lawful confinement" includes an inmate's absence from her designated correctional facility if the inmate remains in the custody of state official. Therefore, as a matter of law, plaintiff was effectively in custody during her work at the Department of Public Safety. Custodial confinement relates solely to the status of the plaintiff at the time of the alleged acts.

REQUIREMENT OF CUSTODIAL CAPACITY

Persons to whom the state delegates its penological responsibility – which include the custody and/or supervision of, or providing job experience to, prisoners – can be held liable for violations of the Eighth Amendment.

In other words, those individuals who are not prison guards or prison officials, but who are nevertheless acting under the authority delegated to them by prison officials, bear the duty under the Eighth Amendment to refrain from using cruel and unusual punishment against inmates.

Therefore, in order to hold the defendant liable to the plaintiff on plaintiff's Eighth Amendment claim of cruel and unusual punishment, the plaintiff must prove, by a preponderance of the evidence, that the defendant wielded authority over her that was delegated to him by the Department of Corrections. That is, the plaintiff must prove that the defendant had the custodial authority of administering the conditions of plaintiff's custody while she worked at the Department of Public Safety.

PROOF OF STATE LAW VIOLATION

For plaintiff to prevail on her Eighth Amendment claim under 42 U.S.C. §1983, she must do more than simply prove that the defendant violated a state statute. Rather, plaintiff must prove, by a preponderance of the evidence, each of the elements set forth in these instructions for a violation of Cruel and unusual punishment under the Eighth Amendment, independent of any violation of a state statute by the defendant.

SECOND CLAIM
SEXUAL ASSAULT AND BATTERY

In order for plaintiff, Pamela Smith, to recover on plaintiff's action of sexual assault and battery, you must find that the following have been established:

First: The defendant acted without consent to intentionally touch, maul or feel the body or private parts of plaintiff;

Second: That such conduct was performed in a lewd and lascivious manner;

OR

First: The defendant acted to intentionally touch, maul or feel the body or private parts of plaintiff;

Second: That such conduct was committed by a state employee upon the person of the plaintiff; and

Third: Plaintiff was, at the time of such conduct, a person under the legal custody, supervision or authority of a state agency.

Please take notice that under the circumstances of a finding that the conduct by a state employee amounting to sexual battery upon a person who is under the legal custody, supervision or authority of a state agency, consent is not a defense to such conduct.

APPREHENSION DEFINED

Apprehension is defined as a state of mind created by the conduct of another which causes a person to feel, that considering all the circumstances, she will be subject to an immediate harmful contact by another person.

INTENT

A person intends to commit a battery if he acts for the purpose of making a harmful contact with another. Assault and battery are intentional torts. Mere negligence does not constitute assault and battery.

THIRD CLAIM

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

As to her third claim for relief, plaintiff seeks to recover monetary damages from the defendant on a claim of intentional infliction of emotional distress. For plaintiff to recover on her claim for intentional infliction of emotional distress, she must prove by a preponderance of the evidence that:

First: The defendant's acts in the setting in which they occurred were so extreme and outrageous as to go beyond all possible bound of decency and would be considered atrocious and utterly intolerable in a civilized society; and

Second: The defendant intentionally or recklessly caused emotional distress to the plaintiff beyond that which a reasonable person could be expected to endure.

INTENTIONAL AND RECKLESS DISREGARD–DEFINED

The defendant intentionally caused emotional distress to the plaintiff if he desired to cause such distress or knew such distress was substantially certain to result from his conduct.

The defendant recklessly caused emotional distress to plaintiff if he knew there was a substantial probability that emotional distress to plaintiff would result from his conduct, and he deliberately disregarded that probability.

EVIDENCE – DIRECT OR CIRCUMSTANTIAL

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence – such as the testimony of an eyewitness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

IMPEACHMENT – INCONSISTENT

A witness may be discredited or "impeached" by contradictory evidence, by a showing that the witness testified falsely concerning a material matter or by evidence that at some other time the witness has said or done something – or has failed to say or do something – which is inconsistent with the present testimony of the witness.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

EXPERT WITNESS

The testimony of certain expert witnesses has been offered and admitted into evidence in this case based upon the witness' attainment of a degree of experience in a particular field. A witness, who by education and experience has become expert in an art, science, profession or calling, may be permitted to state an opinion as to a matter in which such witness is versed and which is material to the case; and such witness may also state the reasons for such opinion. You should consider such expert opinion so received in evidence and give it such weight as you think it deserves, and you may reject it entirely if you conclude the reasons given in support of the opinion are not sound.

DAMAGES – ACTUAL

Should you find from a preponderance of the evidence and under these instructions in favor of plaintiff and against the defendant, then you may assess the amount of recovery for the actual or compensatory damages which you find were sustained by plaintiff as a direct and proximate result of the incident involved herein, which damages must not be oppressive or unconscionable but which you find will reasonably and fairly compensate plaintiff insofar as the same may be computed in money.

In fixing the amount you will award, if any, you may consider the following elements:

1. physical pain and suffering, past and future;
2. mental pain and suffering, past and future;
3. age;
4. physical condition immediately before and after the wrongful conduct;
5. the nature and extent of her injuries;
6. physical impairment;
7. lost wages, past and future, if any; and
8. medical expenses.

NOMINAL DAMAGES

42 U.S.C. §1983

If you find that plaintiff, Pamela Smith, is entitled to a verdict on her claim of cruel and unusual punishment under 42 U.S.C. §1983, and in accordance with these instructions, but you do not find that plaintiff has sustained any actual or compensatory damages, then you may award plaintiff nominal damages.

EXEMPLARY OR PUNITIVE DAMAGES

In the event that you find actual damages and if you find that the conduct of the defendant amounted to:

1. Gross negligence; or
2. Malice; or
3. Evil intent; or
4. Reckless and wanton disregard of another's rights;

then you may grant plaintiff exemplary damages in which sum as you reasonably believe will punish the defendant and be an example to others.

Exemplary damages are not to be construed as compensation to the plaintiff, but as punishment to the defendants, and as an example to others to deter them from like conduct.

To entitle the plaintiff to recover exemplary damages in this type of action, the proof must show some malicious, wanton or oppressive conduct on the part of the defendant. The act which constitutes the cause of action must be actuated by, or accompanied with, some evil intent, or must be the result of such gross negligence, such disregard of another's rights, as to warrant the inference of or be deemed equivalent to an evil intent or perhaps such gross negligence as indicated a reckless disregard for the rights of others.

It is not sufficient for an award of punitive or exemplary damages that the evidence shows only inadvertent conduct on the part of the defendant. The evidence must reveal some evil intent on the part of the defendant or indicate a reckless disregard for the rights of others.

You are further instructed that an act or a failure to act is "maliciously" done, if prompted or accompanied by will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages – in addition to actual damages – is a matter exclusively within the province of the Jury – if the Jury should unanimously find – from a preponderance of the evidence in the case – that the defendant's conduct – which directly caused actual damage to the plaintiff – was maliciously or wantonly or oppressively done.

EFFECT OF INSTRUCTIONS AS TO DAMAGES

The fact that the Court has instructed you as to the proper measure of damages should not be considered by you as intimating any view of the Court as to which side of his litigation is entitled to receive a verdict in this case. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case.

ADVICE CONCERNING NUMBERED VERDICT FORMS

Verdict Forms 1 - 5

In order to facilitate your deliberations, the options available to you under the facts of this case are set out on numbered verdict forms.

The next succeeding instruction will explain the various verdict forms and instruct you under what circumstances each form is applicable.

In the event you find in favor of the plaintiff on one or more of her separate causes of action for violation of 42 U.S.C. §1983, assault and battery, and/or intentional infliction of emotional distress, you will make your determination of the amount of actual damages on Verdict Form No. 4. Even though plaintiff has plead three separate causes of action. She is only entitled to one award of actual damages. In the event you award actual damages, you will then proceed to determine Verdict Form No. 5 as to plaintiff's claim for punitive damages, if any.

VERDICT FORM NO. 1

42 U.S.C. §1983

If you have found that the plaintiff, Pamela Smith, has met her burden of establishing by a preponderance of the evidence that the defendant, Don Cochran, knowingly deprived plaintiff of her constitutional right not to be subjected to cruel and unusual punishment in the manner herein claimed by the plaintiff, then your verdict should be for the plaintiff, Pamela Smith; and you should so indicate on Verdict Form No. 1. You will then proceed to determine the actual monetary damages, if any, to be awarded on Verdict Form No. 4.

On the other hand, if the plaintiff, Pamela Smith, has not met her burden of establishing that she was deprived of her constitutional rights by the defendant, Don Cochran, as claimed, then your verdict should be for the defendant, Don Cochran; and you should so indicate on Verdict Form No. 1.

You will then proceed to determine Verdict Form No. 2.

VERDICT FORM NO. 2

SEXUAL ASSAULT AND BATTERY

If you have found that the plaintiff, Pamela Smith, has met her burden of establishing by a preponderance of the evidence her claim of sexual assault and battery against the defendant, Don Cochran, then your verdict should be for the plaintiff, Pamela Smith; and you should so indicate on Verdict Form No. 2. You will then proceed to determine the monetary damages, if any, to be awarded on Verdict Form No. 4.

On the other hand, if the plaintiff, Pamela Smith, has not met her burden of establishing her claim of sexual assault and battery by defendant, Don Cochran, then your verdict should be for the defendant, Don Cochran; and you should so indicate on Verdict Form No. 2.

You will then proceed to determine Verdict Form No. 3 as to plaintiff's claim for intentional infliction of emotional distress.

VERDICT FORM NO. 3

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

If you have found that the plaintiff, Pamela Smith, has met her burden of establishing by a preponderance of the evidence her claim of intentional infliction of emotional distress against the defendant, Don Cochran, then your verdict should be for the plaintiff, Pamela Smith; and you should so indicate on Verdict Form No. 3. You will then proceed to determine the monetary damages, if any, to be awarded on Verdict Form No. 4.

On the other hand, if the plaintiff, Pamela Smith, has not met her burden of establishing her claim of intentional infliction of emotional distress of defendant, Don Cochran, then your verdict should be for the defendant Don Cochran; and you should so indicate on Verdict Form 3.

VERDICT FORM NO. 5

Only if you have determined that the plaintiff, Pamela Smith, is entitled to actual or nominal damages against the defendant, you should proceed to Verdict Form No. 5 and determine the issue of punitive or exemplary damages as provided in these instructions.

ARGUMENTS AND STATEMENTS OF COUNSEL ARE NOT EVIDENCE

You are instructed that the arguments and statements of counsel are not evidence in the case.

The evidence consists of the sworn testimony of the witnesses, exhibits, facts stipulated, and all pertinent presumptions stated in these instructions.

You are to consider only the evidence in the case. However, in your consideration of the evidence, you are not limited to only the statements of the witnesses. On the contrary, you are permitted to draw – from the facts which you find have been proved – such reasonable inferences as seem justified in the light of your experience.

CONCLUDING INSTRUCTION

In order to return a verdict, each Juror must agree thereto. Your verdict must be unanimous. As Jurors you have a duty to consult with one another and to deliberate with a view toward reaching an agreement, provided agreement can be reached without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow Jurors.

In the course of deliberations, you, as Jurors, should not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. However, you should not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow Jurors, or for the mere purpose of a verdict.

CLOSING

You are the judges of the facts, of the weight of the evidence, and of the credibility of the witnesses. In determining such weight or credit, you may consider the interest (if any) which a witness may have in the result of the trial, the relation of the witness to the parties, the bias or prejudice (if any has been apparent) the candor – fairness – intelligence and demeanor of the witness, the ability of the witness to remember and relate past occurrences, means of observation, and opportunity of knowing the matters about which the witness has testified. From all the facts and circumstances appearing in evidence and coming to your observation during the trial, and aided by the knowledge which you each possess in common with other persons, you will reach your conclusions. You should not let sympathy, sentiment or prejudice enter into your deliberations; but you should discharge your duties as Jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these instructions.

These instructions contain all the law – whether statutory or otherwise – to be applied by you in this case and the rules by which you are to weigh the evidence and determine the facts in issue. You will not use any method of chance in arriving at a verdict, but base it on the judgment of each Juror concurring therein.

The Court has made rulings on the conduct of the trial and the admission of evidence. In so doing, the Court has not expressed – nor intimated in any way – the weight or credit to be given any evidence or testimony admitted during the trial, nor indicated in any way the conclusions to be reached by

you in this case. When the Court has sustained an objection to a question, the Jury should disregard the question, draw no inference from the wording of it, nor speculate as to what the witness would have said if permitted to answer.

After you have retired to consider your verdict, select one of your number as Foreperson and enter upon your deliberations. Your verdict must be unanimous. After you have reached a verdict, your Foreperson alone will sign it; and you will – as a body – return with it into Court. A single form of verdict will be furnished for your consideration and use.

If, during your deliberations, it becomes necessary to communicate with the Court, you may send a note by the Marshal. Bear in mind that you are not to reveal to the Court – or to any person – how the Jury stands – numerically or otherwise – until you have reached your verdict.

The Marshal will come forward to be sworn.

H. DALE COOK
Senior United States District